91-1399

No. ——

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

UTE DISTRIBUTION CORPORATION, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether distributions of Ute Indian tribal mineral assets held in trust by the United States to mixed-blood former members of the Ute Indian Tribe and their successors are subject to federal income tax under Section 17 of the Ute Indian Supervision Termination Act, 25 U.S.C. § 677p.

PARTIES TO THE PROCEEDING

In addition to the petitioner listed in the caption, the following are additional petitioners:

Floyd Wilkerson
Helen Wilkerson
Henry Wopsock
Sam N. Aloia
Sandra K. Aloia
Chris H. Denver

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PETITION FOR A WRIT OF CERTIORARI

Ute Distribution Corporation, Floyd and Helen Wilkerson, Henry Wopsock, Sam N. and Sandra K. Aloia, and Chris H. Denver ("petitioners") hereby petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-13a) is reported at 938 F.2d 1157 (10th Cir. 1991). The opinion of the district court (App., *infra*, 14a-28a) is reported at 721 F. Supp. 1202 (D. Utah 1989).

JURISDICTION

The judgment of the court of appeals was entered on July 16, 1991. The court of appeals denied a petition for rehearing on December 2, 1991. App., *infra*, 29a-30a.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 17 of the Ute Indian Supervision Termination Act of 1954, 25 U.S.C. § 677p, provides in pertinent part:

> No distribution of the assets made under the provisions of this subchapter shall be subject to any Federal or State income tax . . . . Property distributed to the mixed-blood group pursuant to the terms of this subchapter shall be exempt from property taxes for a period of seven years from August 27, 1954, unless the original distributee parts with title thereto, either by deed, descent, succession, foreclosure of mortgage, sheriff's sale or other conveyance . . . . After seven years from August 27, 1954, all property distributed to the mixed-blood members of the tribe under the provisions of this subchapter, and all income derived therefrom by the individual, corporation, or other legal entity, shall be subject to the same taxes, State and Federal, as in the case of non-Indians; except that any corporation organized by the mixed-blood members for the purpose of aiding in the joint management with the tribe and in the distribution of unadjudicated or unliquidated claims against the United States, all gas, oil, and mineral rights of every kind, and all other assets not susceptible to equitable and practicable distribution shall not be subject to corporate income taxes. Any valuation for purposes of Federal income tax on gains or losses shall take as the basis of the particular taxpayer the value of the property on the date title is transferred by the United States pursuant to this subchapter.

STATEMENT

1. *The Policy of Termination.* After World War II, the United States government increased its efforts to "assimilate" tribal Indians into "mainstream" society. See F. Cohen, *Handbook of Federal Indian Law* 152-180

(1982 ed.). "The most extreme extension of assimilation was the termination policy." C. Wilkinson & E. Biggs, *The Evolution of the Termination Policy*, 5 Am. Indian L. Rev. 139, 140 (1977).

In 1953 and 1954, the Eighty-third Congress enacted several statutes, including the Ute Indian Supervision Termination Act (hereinafter the "Ute Partition Act" or the "Act"), 25 U.S.C. §§ 677-677aa, which terminated the status of Indian tribes and eliminated most aspects of the special relationship between the tribes and the federal government. See *Bryan* v. *Itasca County, Minn.*, 426 U.S. 373, 387-88 (1976); *Affiliated Ute Citizens* v. *United States*, 406 U.S. 128, 133 n.1 (1972); App., *infra*, 2a.[1] These termination statutes were enacted quickly and with little study by Congress. Cohen, at 171-75. This termination policy was designed to eliminate any special treatment for Indian tribes and to reduce federal involvement in Indian affairs by terminating federal supervision over the assets of Indian tribes, terminating the trust status of tribal lands and other assets, and dividing tribal assets among individual Indians and Indian tribes. Cohen, at 174-75; Wilkinson & Biggs, at 140; see App., *infra*, 2a-3a; *id.* at 16a.

As early as 1958, however, the Interior Department questioned the wisdom of the termination policy. Wilkinson & Biggs, at 163; see Cohen, at 180

[1] The terminated tribes included: the Paiutes of Utah (Act of Sept. 1, 1954, ch. 1207, 68 Stat. 1099) (codified at 25 U.S.C. §§ 741-760); the Alabama and Coushatta Indians of Texas (Act of Aug. 23, 1954, ch. 831, 68 Stat. 768) (codified at 25 U.S.C. §§ 721-728); sixty-one tribes and bands in western Oregon (Act of Aug. 13, 1954, ch. 773, 68 Stat. 724) (codified as amended at 25 U.S.C. §§ 691-708); the Klamaths of Oregon (Act of Aug. 13, 1954, ch. 732, 68 Stat. 718) (codified as amended at 25 U.S.C. §§ 564-564x); the Menominee Tribe of Wisconsin (Act of June 17, 1954, ch. 303, 68 Stat. 250) (repealed 1973) (formerly codified at 25 U.S.C. §§ 891-902). Termination legislation was enacted with respect to other tribes after 1954.

("The policy of rapid and coercive termination was abandoned in 1958"). Criticism of the termination policy began to mount. *Cf. Bryan*, 426 U.S. at 387-88 & n.14; *Affiliated Ute Citizens*, 406 U.S. at 133 n.1. Even Congress recognized that the policy was a "failure," as terminated Indians did not keep up economically with their federally recognized Indian neighbors and the surrounding non-Indian population. H.R. Rep. No. 1019, 95th Cong., 2d Sess. 3 (1978), *reprinted in* 1978 U.S. Code Cong. & Admin. News 757, 758; see *Santa Rosa Band of Indians* v. *Kings County*, 532 F.2d 655, 663 (9th Cir. 1975), *cert. denied*, 429 U.S. 1038 (1977); Wilkinson & Biggs, at 141 ("most observers have concluded that termination has failed"). During the 1970s and early 1980s, Congress reversed many of the actions it took as part of that policy, repealing several termination statutes enacted by the Eighty-third Congress and restoring federal recognition of and benefits to certain terminated Indian tribes. See, *e.g.*, Paiute Indian Tribe of Utah Restoration Act, Pub. L. No. 227, 96th Cong., 2d Sess. (1980), 25 U.S.C. §§ 761-768; Pub. L. No. 281, 92 Stat. 246, 95th Cong, 2d Sess. (1978), 25 U.S.C. §§ 861-861c (repealing in whole or in part four termination statutes); Menominee Restoration Act, Pub. L. No. 197, 93d Cong., 1st Sess. (1973), 25 U.S.C. §§ 903-903f. Indeed, the enactment of the Menominee Restoration Act has been viewed as a repudiation of the termination policy. See Cohen, at 186-87; Wilkinson & Biggs, at 164-65.

2. *The Ute Partition Act.* When the Ute Partition Act was enacted in 1954, the Ute Indian Tribe of the Uintah and Ouray Reservation in Utah (hereinafter, the "Tribe") had approximately 1,765 members, 439 of whom were mixed-blood Ute Indians and 1,326 of whom were full-blood Ute Indians. *Affiliated Ute Citizens*, 406 U.S. at 133-34.[2] The Tribe owned certain divisible assets, val-

[2] The Ute Indians were not identified as a tribe ready for termination in H.R. Con. Res. 108, a statement of congressional policy in

ued at over $20 million, including cash, accounts receivable, and reservation land. H.R. Rep. No. 2493, 83d Cong., 2d Sess. (1954), *reprinted in* 1954 U.S. Code Cong. & Admin. News 3355, 3356.[3] The Tribe owned indivisible assets consisting of significant subsurface oil, gas, and mineral rights and unadjudicated and unliquidated claims against the United States. See App., *infra*, 3a. Title to the oil, gas, and mineral rights was held in trust for the Tribe by the United States, and "all members of the tribe were the beneficial owners of the mineral interest." *Affiliated Ute Citizens*, 406 U.S. at 141.

The purpose of the Act was to terminate federal supervision over the mixed-blood members of the Tribe, to prepare the full-blood members for termination, and to divide the tribal assets between the mixed-blood and full-blood groups. 25 U.S.C. § 677. As part of their preparation for termination, the Act required the full-blood members to develop a plan within three months after enactment to make the Tribe self-supporting, to eliminate government assistance and to prepare the Tribe for complete termination. 25 U.S.C. § 677w. Congress did not terminate the full-blood Utes.

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favor of termination that "dominated Indian affairs for nearly a decade." F. Cohen, *Handbook of Federal Indian Law* 171 (1982 ed.). *See* H.R. Rep. No. 2680, 83d Cong., 2d Sess. 4 (1954) (Ute Indians not ready for termination). H.R. Con. Res. 108 stated that it was the intent of Congress to terminate certain specific tribes as well as all tribes located in four states "at the earliest possible time." H.R. Con. Res. 108, 83d Cong., 1st Sess., 67 Stat. B132 (1953); *see Menominee Tribe of Indians* v. *United States*, 391 U.S. 404, 408 (1968); Cohen, at 171-72. Senator Arthur Watkins of Utah was one of the leading proponents of termination and had a significant influence over the formation of Indian policy. *See* Cohen, at 172-73; C. Wilkinson & E. Biggs, *The Evolution of the Termination Policy*, 5 Am. Indian L. Rev. 139, 155-56 (1977).

[3] Most of the $13.7 million of cash resulted from a settlement judgment from the United States in *Confederated Bands of Ute Indians* v. *United States*, 117 Ct. Cl. 433 (1950); *see* 25 U.S.C. § 672.

The Act set forth a detailed procedure for termination of the mixed-blood group and the division of tribal assets between the two groups, and distribution to their members. The Act required the Tribe to prepare a roll of its full-blood and mixed-blood members (25 U.S.C. § 677g) and permitted full-blood members of the Tribe to opt for mixed-blood status for purposes of the Act (25 U.S.C. § 677c). Section 5 provided that on the publication of the final membership roll, the Tribe "shall thereafter consist exclusively of full-blood members" and the mixed-blood members (including the full-blood Utes who elected this status) were to have no other interest except that described in the Act. 25 U.S.C. § 677d; see *Affiliated Ute Citizens*, 406 U.S. at 134.

Congress recognized that only certain of the Tribe's assets could be divided between the two groups and distributed to their members. With respect to tribal assets "that are then susceptible to equitable and practicable distribution" (*i.e.*, cash, accounts receivable, and land), the representatives of the full-blood and mixed-blood groups were to agree to a division of those assets based on the proportionate membership of the two groups set forth in the membership roll. 25 U.S.C. § 677i.[4] After the division of these assets, the mixed-bloods' share was to be distributed among the individual mixed-blood members of the Tribe. 25 U.S.C. § 677l. Federal supervision over the mixed-blood members was terminated, and the trust relationship over the divisible assets was removed. 25 U.S.C. §§ 677o, 677i.

The assets "not susceptible to equitable and practicable distribution" were to remain in government trust, 25 U.S.C. § 677o(a), and "be managed jointly by the Tribal Business Committee and the authorized representatives

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[4] Approximately twenty-seven percent of the Ute Indians on the final rolls were mixed-blood members of the tribe. *See* 21 Fed. Reg. 2208-2220 (1956); *Affiliated Ute Citizens* v. *United States*, 406 U.S. 128, 135 n.5 (1972).

of the mixed blood group," 25 U.S.C. § 677i; App., *infra*, 3a. The net proceeds from the oil, gas and mineral rights, less any management expenses, were to be divided between the two groups in proportion to their numbers. 25 U.S.C. § 677i. "Congress therefore devised a method of distributing the proceeds of the indivisible assets over an extended period of time to the members of the terminated and non-terminated group." App., *infra*, 3a.

3. *The Ute Distribution Corporation.* The mixed-bloods organized Affiliated Ute Citizens ("AUC") to act as their designated representative in 1956. *Affiliated Ute Citizens*, 406 U.S. at 135. AUC approved a Plan of Distribution to transfer divisible assets directly to the mixed-bloods as contemplated by the Act; and the cash, accounts receivable and land were divided between the full-blood and mixed-blood groups. App., *infra*, 18a.

The Plan of Distribution envisioned that a separate corporation would manage the indivisible assets on behalf of the mixed-bloods and would distribute those assets to the members of that group. See *Affiliated Ute Citizens*, 406 U.S. at 136. As originally enacted, however, the Act contemplated that the United States government would continue to distribute the oil, gas, and mineral rights to the two groups of Ute Indians. See 25 U.S.C. § 677i. Therefore, in 1956, Congress amended the Act to authorize the participation of petitioner Ute Distribution Corporation ("UDC") in the distributive scheme. Act of Aug. 2, 1956, 70 Stat. 936. In approving the 1956 amendments, Congress recognized that "[s]ince liquidation and division of the [oil, gas, and mineral rights] assets may extend for many years, it is highly desirable, particularly from the standpoint of the Government, to form a corporation to permanently represent the mixed-blood group and to which the mixed-blood share of these assets may be paid in lump sums as they are liquidated." H.R. Rep. No. 2744, 84th Cong., 2d Sess. 2 (1956); S. Rep. No. 2432, 84th Cong., 2d Sess. 2 (1956). The contemplated

corporation would make management decisions with respect to the mixed-bloods' share of the indivisible assets and "distribute to its stockholders (the mixed-blood members, their heirs, and assigns) the net revenues from such sources." H.R. Rep. No. 2744, at 2; S. Rep. No. 2432, at 2; see App., *infra*, 18a.

Congress also amended section 17 of the Act to prevent any taxation of petitioner UDC, reasoning that such an amendment was necessary "to *preserve* the tax-exempt status of the distributions from the trust funds held by the United States Government on the principle that the corporation would merely act as a conduit for the transmission of funds received from the Government to the members of the mixed-blood group." H.R. Rep. No. 2744, at 2 (emphasis added); S. Rep. No. 2432, at 2. In commenting on the 1956 amendments, the Department of the Interior supported the tax exemption for UDC because

> the ultimate division and distribution of [the indivisible] assets will not be subject to income tax, we believe that it is proper to exempt the interim corporation that will be organized principally for the convenience of the Government from corporate income taxes. Otherwise the individual members of the mixed-blood group would be subjected to double taxation on the *distribution of capital tribal assets that the act contemplated would not be taxed at all.*

H.R. Rep. No. 2744, at 3-4 (emphasis added); S. Rep. No. 2432, at 3.

Petitioner UDC was formed in 1958 to manage jointly with the Tribal Business Committee the indivisible assets, including gas, oil and mineral rights, "to receive the proceeds therefrom and to distribute the same to the stockholders of this corporation." See *Affiliated Ute Citizens*, 406 U.S. at 136. Each mixed-blood received ten shares of stock in UDC, which entitled the stockholder to vote for mixed-blood delegates and to receive distributions

from the jointly managed property. See *id.* at 136-37; App., *infra*, 18a.[5]

Effective August 27, 1961, the termination of the mixed-blood members of the Tribe was completed when the Secretary of Interior issued a proclamation ending the federal supervisory relationship over the mixed-blood group. 26 Fed. Reg. 8042 (1961); App., *infra*, 4a. The Ute Indian Tribe thereafter consisted only of full-blood members who did not opt out of the Tribe.[6] As this Court has previously observed, "The termination proclamation . . . , of course, did not purport to terminate the trust status of the undivided assets." *Affiliated Ute Citizens*, 406 U.S. at 139; see App., *infra*, 4a; *United States* v. *Felter*, 752 F.2d 1505, 1508 (10th Cir. 1985); *Maldonado* v. *Hodel*, 683 F. Supp. 1322, 1329 (D. Utah 1988). "There is, and can be, no dispute that the United States holds title to the land, including the mineral interest, constituting the Uintah and Ouray Reservation." *Affiliated Ute Citizens*, 406 U.S. at 141. The mineral interest relates to the tribal land and remains tribal property, and the mixed-blood members retained their status as tribal members with respect to these indivisible trust assets. See *id.* at 142-43.

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[5] Full- and mixed-blood members of the Ute Indian Tribe had a ten-year right of first refusal that expired on August 26, 1964 to purchase UDC stock that the original mixed-blood stockholders wanted to sell. *Affiliated Ute Citizens*, 406 U.S. at 137; 25 Fed. Reg. 7620 (1960). The Tribe exercised this right, and is currently the largest single stockholder in UDC, owning 17% of UDC's outstanding stock.

[6] Unlike most other termination acts that terminated entire tribes, the Ute Partition Act terminated only the mixed-blood members of the Tribe. Although the Act terminated the mixed-bloods' status as members of the Tribe, it did *not*, and indeed could not, terminate their status as Ute Indians. *See, e.g., United States* v. *Felter*, 752 F.2d 1505, 1511-12 (10th Cir. 1985); *see also Menominee Tribe of Indians* v. *United States*, 388 F.2d 998, 1000-01 (Ct. Cl. 1967) ("The Termination Act did not abolish the *tribe* or its membership"), *aff'd*, 391 U.S. 404 (1968).

4. *The Tax Status of Distributions from UDC.* Until 1982, the federal government—both the Department of the Interior and the Internal Revenue Service—considered distributions of indivisible assets funnelled through petitioner UDC to be tax-exempt pursuant to Section 17 of the Act. See App., *infra*, 4a. The Department of Interior has always interpreted Section 17 to exempt UDC distributions from tax. See App., *infra*, 19a; H.R. Rep. No. 2744, 84th Cong., 2d Sess. 2 (1956); S. Rep. No. 2432, 84th Cong., 2d Sess. 2 (1956); Memorandum from William R. McConkie (Feb. 10, 1983) App., *infra*, 59a; Letter from William R. McConkie (May 5, 1987) App., *infra*, 31a. Moreover, in the 1970s, the IRS *refunded* income taxes erroneously paid by UDC stockholders on distributions from UDC.

In a break from all previous interpretations of Section 17, an IRS field agent asserted in 1982 that UDC distributions to its stockholders were taxable and that UDC had to file informational returns. App., *infra*, 19a. An IRS attorney assigned to investigate the tax status of UDC distributions concluded that because " 'it was the intent of Congress in terminating federal supervision over the mixed-blood trust assets to treat the mixed-bloods as non-Indians . . ., we believe that any distribution made to a mixed-blood after August 27, 1961 was and is subject to income tax.' " App., *infra*, 19a (quoting March 3, 1983 opinion letter). Although the acting district director of the IRS subsequently indicated that the IRS would consider dropping its attempts to assess taxes on UDC distributions; in 1986, the IRS instituted audits of petitioner UDC and its stockholders. *Id.* at 21a. The IRS issued deficiency notices and assessed interest and penalties against UDC stockholders for the 1984 tax year.

Meanwhile, the Department of Interior continued to interpret Section 17 of the Act to exempt UDC distributions from income taxes. In 1983, the Department reiterated that the tax exemption set forth in the first sen-

tence of Section 17 applies to distributions by UDC. Memorandum from William R. McConkie (Feb. 10, 1983) App., *infra* 59a. Even after the IRS concluded that UDC distributions were taxable, Interior strongly disagreed with that conclusion, stating that the IRS's position that "mixed-blood Ute Indians as a protected class must pay federal income tax on monies received by virtue of stock held by them in the Ute Distribution Corporation is clearly erroneous." Letter from William R. McConkie (May 5, 1987) App., *infra*, 31a.

The IRS continued to insist, however, that UDC distributions were taxable. Accordingly, the individual petitioners were selected as representatives of different categories of UDC stockholders in consultation with the IRS to challenge the authority of the IRS to assess the proposed taxes. Petitioners Helen Wilkerson and Sandra K. Aloia are original mixed-blood stockholders of UDC terminated from the Ute Indian Tribe pursuant to the Act.[7] Petitioner Henry Wopsock is a full-blood Ute Indian and an original UDC stockholder who elected to be terminated from the Tribe. He also acquired five additional shares of UDC stock by inheritance. Chris H. Denver is a non-Indian who owns three shares of UDC stock. The individual petitioners received from $2,425 to $10,875 in distributions from UDC in 1984, and the IRS's tax deficiencies assessed against them for that year ranged between $389 and $2,557.

These petitioners exhausted their administrative remedies, paid the taxes, interest and penalties, and filed an action in the United States District Court for the District of Utah, seeking a refund of the 1984 income taxes and penalties. Petitioner UDC sought a refund of the IRS assessment for failure to file Form 1099 in 1984 and 1985 and a declaratory judgment that it was not required to file Form 1099 for future distributions.

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[7] Petitioners Floyd Wilkerson and Sam Aloia filed joint tax returns with their wives and are petitioners for that reason.

On July 27, 1989, the district court issued its memorandum decision and order, holding that the distributions from petitioner UDC were subject to federal income tax, but that as a matter of fundamental fairness, the court's ruling would apply prospectively only commencing with the 1989 tax year. App., *infra*, 26a. Accordingly, the court ordered the IRS to refund to the individual petitioners the 1984 income taxes that they had paid in protest. The court also held that petitioner UDC was not required to file 1099 informational forms and refunded $50,400 in penalties paid by UDC for failure to file such forms in 1984 and 1985.

Petitioners appealed from the district court's holding that distributions from UDC were subject to federal income tax. Respondent cross-appealed, asserting that the district court erred in failing to apply its decision retroactively. The court of appeals, with little analysis of the statutory language, stated simply: "Congress expressed an intent in section 677p to make distributions received after a specific date subject to federal income tax" and that "UDC shareholders must pay federal income tax on all distributions received after August 27, 1961." App., *infra*, 8a-9a. Therefore, in the view of the court below, because the Act was unambiguous, canons directing a court to construe statutes in favor of Indians did not apply. *Id.* at 8a. The court added that because the 1956 amendments to the Act were adopted before the UDC distributions lost their tax exemption in 1961, the legislative history indicating that such distributions were to remain tax-exempt did not contradict the court's reading of the Act's language. App., *infra*, 9a-10a. The court also concluded that the taxation of distributions was consistent with the policy of termination as reflected in H.R. Con. Res. 108. *Id.* at 10a. The court stated that petitioners' argument that the phrases "distribution of assets" and "property distributed" should not be interpreted identically was a "tortured construction of section 677p [that] is contrary to the statute's plain language."

Id. at 10a-11a. Finally, the court of appeals concluded that the district court erred in holding that its decision should not apply retroactively, stating that the "statute is clear regarding the legal liability for taxes on the interests involved here beginning on August 27, 1961." *Id.* at 12a.

REASONS FOR GRANTING THE PETITION

The Tenth Circuit has decided an issue of critical importance to the terminated members of the Ute Indian Tribe in a manner that is flatly inconsistent with the plain language of the Ute Partition Act. In doing so, the court below ignored fundamental principles of statutory construction recognized by this Court, and, for that reason, its decision conflicts with decisions of this Court. The court of appeals likewise failed to apply principles of construction developed by this Court for the protection of Indians and in recognition of the special relationship between Indians and the federal government.

Moreover, the court of appeals' decision is inconsistent with the policy of termination and the federal trust status over Ute Indian assets distributed through UDC. As part of the government's termination policy, *no* distribution of tribal assets—made pursuant either to the Ute Partition Act or to other termination statutes—was subject to taxes when initially distributed to members of the terminated tribes. In other contexts, Congress likewise has exempted from income tax the distribution of tribal assets held in trust by the government to a tribe or its members. This tax exemption is not a benefit granted to Indians, but merely a recognition of the fact that those assets were owned by Indians long before there was a federal government and only held by the government in trust for the Indians. In short, the decision below turns two-hundred years of American Indian law on its head. This Court should grant the petition to correct the misapplication of this fundamental tenet of Indian law.

Finally, this Court should review the decision below because of the importance of the issue to the terminated members of the Ute Indian Tribe. The taxation of UDC distributions reduces the value of the assets held in trust and distributed to petitioners and further frustrates the goal of economic self-sufficiency that termination was designed to help achieve. The decision of the court below is manifestly unfair by permitting the imposition of a tax on UDC distributions that Congress and the Ute Indians contemplated would be distributed tax-free. Even though the government has abandoned and, indeed, repudiated the failed policy of termination, the court below permitted the IRS to reduce dramatically the minimal economic benefit that the terminated members of the Tribe received from termination. This Court should grant the petition to ensure that the terminated Utes are not treated more harshly than all other members of terminated tribes.

1. Review of the decision below is warranted because the court of appeals decided this case in a manner completely at odds with the plain language of the statute. As a result, the court of appeals' decision is wholly inconsistent with decisions of this Court. Section 17, 25 U.S.C. § 677p, provides in part (emphasis added):

> No *distribution of the assets* made under the provisions of this subchapter shall be subject to any Federal or State income tax . . . . *Property distributed* to the mixed-blood group pursuant to the terms of this subchapter shall be exempt from *property taxes* [until August 27, 1961] . . . . After [August 27, 1961,] all *property distributed* to the mixed-blood members of the tribe under the provisions of this subchapter . . ., and all income derived therefrom by the individual, corporation, or other legal entity, shall be subject to the same taxes, State and Federal, as in the case of non-Indians.

The plain language of the statute describes three separate tax exemptions: (1) the distribution of tribal as-

sets is not subject to any income tax; (2) once property is distributed (*i.e.*, land), it is exempt from property tax until 1961; (3) after 1961, the property distributed is subject to property tax, as is any income derived from that property such as capital gains from its sale or rental income. The latter provisions relating to "property distributed" in no way limit or alter the blanket exemption from income tax on the "distribution of assets." The court of appeals' holding that distributions of assets from UDC is "property distributed" within the meaning of Section 17 is clearly wrong.

This Court has long held that different phrases in the same statute should not be interpreted to have an identical meaning. See, *e.g.*, *Russello* v. *United States*, 464 U.S. 16, 23 (1983); *United Sav. Ass'n* v. *Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988). Yet the court below ignored this rule and impermissibly interpreted "distribution of assets" and "property distributed" to mean the same thing. *Cf. Department of Treasury* v. *Federal Labor Relations Auth.*, 110 S. Ct. 1623, 1629 (1990) ("[a] statute that in one section refers to 'law, rule or regulation,' and in another section to only 'laws' cannot, unless we abandon all pretense at precise communication, be deemed to mean the same thing in both places"). It is likewise clear that "property distributed," which is exempt from *property* taxes for seven years, refers only to real or personal property that is subject to property taxes. Distributions from UDC do not fit into the phrase "property distributed."

Indeed, the decision of the court below ignores the fact that Congress explicitly referred to "distribution" of indivisible assets by UDC. Section 17 itself specifically mentions the "corporation organized by the mixed-blood members for the purpose of aiding . . . in *the distribution of*" indivisible assets (*i.e.*, UDC). 25 U.S.C. § 677p

(emphasis added).[8] See 25 U.S.C. § 677i (UDC formed to act as authorized representative of mixed-blood group in "*the distribution*" of indivisible assets) (emphasis added). The UDC distributions at issue here are *not* income derived from property distributed to the mixed-blood members. Rather, UDC distributions are proceeds from assets held in government trust "not susceptible to equitable and practicable distribution." Each time UDC makes a distribution to petitioners and other UDC stockholders, that is a distribution of indivisible tribal assets under the Act and exempt from income tax pursuant to the plain language of Section 17.[9]

The decision below also conflicts with the well established principle that an agency's interpretation of an ambiguous statute it administers is entitled to deference. See, *e.g.*, *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Here, the Ute Partition Act and Section 17, which relate to federal, state, and local taxation, is administered by the Department of Interior, not the Internal Revenue Service, and Interior's long-standing interpretation of that provision is entitled to deference. By failing to defer to the Department of Interior's view, the decision below is inconsistent with the decision of the Ninth Circuit in *Stevens* v. *Commissioner of Internal Revenue*, 452 F.2d

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[8] Of course, statutory provisions must be read "in the context of the *entire* section in which they appear." *Shell Oil Co.* v. *Iowa Dep't of Revenue*, 488 U.S. 19, 26 (1988).

[9] The decision below also is inconsistent with decisions of this Court holding that the tense of words used by Congress should be given effect. *See Gwaltney* v. *Chesapeake Bay Found., Inc.*, 484 U.S. 49, 56 (1987); *Barrett* v. *United States*, 423 U.S. 212, 216-17 (1976). Here, Congress used two forms of the root word "distribute." "Distributed" obviously is past tense, and "distribution," although a noun, has a present tense connotation. *See* Webster's Third New International Dictionary 660 (1971) (distribution defined as "the act or process of distributing or the condition of being distributed"). "Congress knew the significance and meaning of the language it employed." *Barrett*, 423 U.S. at 217.

741, 746 (9th Cir. 1971), where the court held that deference was appropriate to the Department of Interior's interpretation of a tax issue with respect to Indians. There, the court observed, "[a]s the agency charged with the administration of the Indian laws and responsible for drafting many of them, Interior's interpretation is entitled to 'great weight' and 'is not to be overturned unless clearly wrong.'" *Id.* at 746 (*quoting United States* v. *Jackson*, 280 U.S. 183, 193 (1930)); see *Mountain States Tel. & Tel. Co.* v. *Pueblo of Santa Ana*, 472 U.S. 237, 254 (1985) ("The uniform contemporaneous view of the Executive Officer [the Secretary of Interior] responsible for administering the statute . . . 'is entitled to very great respect.'") (quoting *Edwards' Lessee* v. *Darby*, 12 Wheat. 206, 210 (1827)).

The decision below also failed to apply a long-standing principle of statutory interpretation developed by this Court to protect Indians. "The canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians." *County of Oneida* v. *Oneida Indian Nation*, 470 U.S. 226, 247 (1985); see F. Cohen, *Handbook of Federal Indian Law* 221-24 (1982 ed.).[10]

The decision below conflicts with the "eminently sound and vital canon," *Northern Cheyenne Tribe* v. *Hollowbreast*, 425 U.S. 649, 655 n.7 (1976), that ambiguous provisions in statutes are to be construed liberally in favor of Indians. See, *e.g.*, *County of Yakima* v. *Confederated Tribes & Bands of the Yakima Indian Nation*, 60 U.S.L.W. 4067, 4072 (1992); *Montana* v. *Blackfeet*

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[10] These canons clearly apply to the mixed-bloods. *United States* v. *Felter*, 752 F.2d 1505, 1511-12 (10th Cir. 1985); *Chapoose* v. *Clark*, 607 F. Supp. 1027, 1035-36 (D. Utah 1985), *aff'd on other grounds*, 831 F.2d 931 (1987); *see Menominee Tribe of Indians* v. *United States*, 388 F.2d 998, 1000-01 (Ct. Cl. 1967), *aff'd*, 391 U.S. 404 (1968).

Tribe of Indians, 471 U.S. 759, 766 (1985); *Alaska Pac. Fisheries Co.* v. *United States*, 248 U.S. 78, 89 (1918).[11] This Court has not hesitated to apply this canon of construction with equal force in tax cases. See *Bryan* v. *Itasca County, Minn.*, 426 U.S. 373, 392 (1976) ("This principle of statutory construction has particular force in the face of claims that ambiguous statutes abolish by implication Indian tax immunities"); *McClanahan* v. *State Tax Comm'n*, 411 U.S. 164 (1973); *Choate* v. *Trapp*, 224 U.S. 665, 675 (1912) ("This rule of constructions has been recognized, without exception, for more than a hundred years, and has been applied in tax cases").

In the recent case of *County of Yakima* v. *Confederated Tribes & Bands of the Yakima Indian Nation*, 60 U.S.L.W. 4067 (1992), this Court was presented with much the same question as presented here—whether a taxing authority could tax Indians based on an interpretation of a statute that did not comply with the literal language of the statute. There, this Court rejected the contention that an excise tax imposed on the sale of land constituted "taxation of . . . land" within the meaning of the Burke Act proviso to the General Allotment Act. There, as here, there were two competing interpretations of the provision in question.[12] The Court held, "When we are

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[11] Although the court below recognized that such canons exist, it concluded that the plain language of Section 17 foreclosed the interpretation advanced by petitioners. As demonstrated above, however, the court of appeals' interpretation of that provision is inconsistent with the language of the Act. Indeed, the decision below made no attempt to reconcile the language of Section 17, even though "[t]here is another reading of the statute that better harmonizes the two clauses of § 17 with the structure of the entire Act." *See Mountain States Tel. & Tel. Co.* v. *Pueblo of Santa Ana*, 472 U.S. 237, 252 (1985).

[12] This Court recognized that "[i]t does not exceed the bounds of permissible construction to interpret 'taxation of land' as including taxation of the proceeds from sale of land . . . ." *County of Yakima*

faced with these two possible constructions, our choice between them must be dictated by a principle deeply rooted in this Court's Indian jurisprudence: 'statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.'" *County of Yakima*, 60 U.S.L.W. at 4072 (quoting *Montana* v. *Blackfeet Tribe of Indians*, 471 U.S. at 766). The Court concluded:

> The short of the matter is that the General Allotment Act explicitly authorizes only "taxation of . . . land," not "taxation with respect to land," "taxation of transactions involving land," or "taxation based on the value of land." Because it is eminently reasonable to interpret that language as not including a tax upon the sale of real estate, our cases require us to apply that interpretation for the benefit of the Tribe.

Id. Here, it is more than reasonable to conclude that the distributions from UDC are exempt from income taxes. Indeed, that is the only proper reading of the statute.[13]

2. This case presents an important issue of federal Indian law regarding the tax status of distributions from tribal assets held in trust for the benefit of the terminated members of the Ute Indian Tribe. The decision below warrants review because, in three separate respects, it is inconsistent with the recognized policy that tribal assets held in trust and distributed to terminated Indians will not be taxed as income when they are distributed.

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v. *Confederated Tribes & Bands of the Yakima Indian Nation*, 60 U.S.L.W. 4067, 4072 (1992). It likewise observed that it was also reasonable to conclude that "though the object of the *sale* here is land, that does not make land the object of the *tax*." *Id.*

[13] For this reason and because of the close parallels between the issue presented here and the decision in *County of Yakima*, petitioners request that this Court grant their petition, vacate the decision below and remand this case to the court of appeals.

First, the court of appeals' decision is inconsistent with the nontaxable status of distributions of trust assets pursuant to terms of the Ute Partition Act and this Court's interpretation of the Act. The court below held that "[f]or the mixed bloods, the application of [the termination] policy in section 677p would require them to assume the responsibility of paying taxes on all income received after their membership in a distinct Indian tribe was terminated." App., *infra*, 10a. But this wholly ignores the fact that, as this Court has recognized, the United States continues to hold title to the mineral interests underlying the tribal lands (*Affiliated Ute Citizens* v. *United States*, 406 U.S. 128, 141 (1972)), and that those mineral interests remain tribal property (*id.* at 142-43). Further, the mixed-blood members retained their status as tribal members with respect to the indivisible trust assets. See *id.* at 143. Termination under the Act "did not purport to terminate the trust status of the undivided assets." *Id.* at 139; see *United States* v. *Felter*, 752 F.2d 1505, 1508 (10th Cir. 1985); *Maldonado* v. *Hodel*, 683 F. Supp. 1322, 1329 (D. Utah 1988); *cf.* *Menominee Tribe of Indians* v. *United States*, 391 U.S. 404 (1968). To the extent that the court below treated the mixed-blood members of the Tribe as terminated with respect to the indivisible assets, that decision conflicts with this Court's recognition in *Affiliated Ute Citizens* that those assets remain in trust and the mixed-blood group was not terminated for purposes of those assets.

The Tenth Circuit's interpretation of the Act further ignores the Act's textual recognition of the principle that distributions of trust assets are not subject to income tax. Section 17 of the Ute Partition Act unequivocally states: "[n]o distribution of the assets made under the provisions of this subchapter shall be subject to any Federal or State income tax." 25 U.S.C. § 677p. "Assets" specifically includes "any property . . . held . . . by the United States in trust for the tribe." 25 U.S.C.

§ 677a(f). Plainly, because distributions from UDC are assets held in trust for the Tribe and are "distribution[s] of assets made under the provisions" of the Act, they are therefore exempt from income tax.

Second, the decision of the court below conflicts with the tax treatment of distributions of tribal assets under other termination statutes and, in that regard, is inconsistent with this Court's decisions in *Bryan* v. *Itasca County, Minn.*, 426 U.S. 373 (1976) and *Menominee Tribe of Indians* v. *United States*, 391 U.S. 404 (1968). In those cases, this Court held that Indian statutes enacted by the Eighty-third Congress, including Public Law 280 and the termination acts adopted in 1953 and 1954, should be interpreted *in pari materia*. *Bryan*, 426 U.S. at 389-90; *Menominee Tribe*, 391 U.S. at 411. Each of the other termination statutes enacted in 1953 and 1954 provides:

> No property distributed under the provisions of this subchapter shall *at the time of distribution* be subject to Federal or State income tax. *Following any distribution of property* made under the provisions of this subchapter, such property and any income derived therefrom by the individual, corporation, or other legal entity shall be subject to the same taxes, State and Federal, as in the case of non-Indians.

E.g., 25 U.S.C. § 564j (Klamath Indian Tribe) (emphasis added).[14] The Ute Partition Act differs from the other termination statutes enacted by the Eighty-third Congress in that a significant portion of the Ute tribal assets consisted of indivisible oil, gas and mineral rights. App., *infra*, 3a. Reading Section 17 of the Act *in pari materia* with the other termination acts compels the conclusion that distributions from UDC are not subject to Federal income tax "at the time of distribution." This

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[14] *See* 25 U.S.C. § 749 (Southern Paiutes of Utah) (same tax provision); 25 U.S.C. § 699 (sixty-one tribes and bands in western Oregon) (same tax provision); 25 U.S.C. § 898 (Menominee Tribe of Wisconsin) (same tax provision) (repealed 1973).

Court should therefore review the decision below because the court of appeals failed to read the Act *in pari materia* with other termination statutes and the failure to do so has resulted in disparate tax treatment of terminated Utes vis-a-vis all other Indians terminated by the Eighty-third Congress.

Finally, the court of appeals' decision is inconsistent with the generally recognized principle that distributions of Indian trust property are *not* subject to income tax. Because of the unique trust relationship between the government and tribal property, Congress traditionally exempts from income tax distributions of such property to Indian tribes and their members. See, *e.g.*, 25 U.S.C. § 459e (distribution of tribal income from specified lands); §§ 674, 676 (distribution of compensation for lands acquired by United States); § 1407 (distribution from claims judgment found).[15]

This Court has likewise recognized the existence of a tax exemption for distributions from trust property. See *Squire* v. *Capoeman*, 351 U.S. 1, 9-10 (1956) (holding that trust property and income derived directly from trust property are exempt from income taxes). By preserving this tax-exempt status for distributions of trust property, the government not only helped to ensure the Indians' economic survival, see *Squire*, 351 U.S. at 10, but also fulfilled the government's historic obligation to

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[15] The unique legal status of Indians is rooted in the longstanding special relationship that exists between these citizens and the Federal Government. Indeed, the concept of federal trust responsibility, the cornerstone of federal policy toward the Indians, evolved judicially. *See Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831) (Indians' "relation to the United States resembles that of a ward to his guardian"); F. Cohen, *Handbook of Federal Indian Law* 220 (1982 ed.). Tribal property is a form of "ownership in common." *See* Cohen, at 472. Individual Indians had no title or enforceable right in tribal property, although they did have an equitable interest in that property. *See Choate* v. *Trapp*, 224 U.S. 665, 671 (1912).

leave the Indians the land and assets that rightfully belonged to them. This general principle of tax exemption for trust assets is fully consistent with the policy of termination and the language of the Ute Partition Act. The court below, however, concluded that the mixed-blood members of the Ute Tribe are not entitled to such a tax exemption, in conflict with this principle. In short, the decision below warrants review because it "construe[s] the Termination Act as a backhanded way of abrogating the . . . rights of . . . Indians," something this Court declined to do in *Menominee Tribe*, 391 U.S. at 412.

3. This case also presents an overriding issue of importance to the terminated mixed-blood members of the Tribe. Both the mixed-bloods and the remaining full-blood members of the Tribe fully contemplated that the continued distribution of assets from the mineral and gas rights underlying tribal lands would be exempt from taxes. Indeed, until 1982, the government of the United States—both the Internal Revenue Service and the Department of Interior—concurred in that assessment. In that year, however, the IRS broke ranks with the agency responsible for Indian affairs and the IRS's own 20-year practice of holding that UDC distributions were tax-exempt.

The amount of taxes assessed against the individual petitioners is small and, indeed, insignificant to the United States Government. But to petitioners and those they represent, it is significant. UDC stockholders received $725 per share in 1984. The mixed-blood Utes lost their status as members of the tribe pursuant to the Act, and the protections available to them as Indians were likewise eliminated. In return, the mixed-bloods' share of the tribal assets was distributed to the individual terminated Utes, a distribution that continues to this day through UDC. Now, however, the United States Government is seeking to diminish the value of

those indivisible assets by requiring the former mixed-blood members of the Tribe to pay taxes on distributions from UDC. The payment of back taxes may well be a crippling financial blow to some, if not all, of those individuals.

Review by this Court is particularly important given the checkered history of termination. Termination was a failed policy.[16] Many Indian tribes that were terminated have had their tribal status restored. Although the Act contemplated that the full-blood Utes would be terminated, they never reached that stage. Only the mixed-bloods were terminated from the Tribe. Now, the very government that pursued that failed policy of termination is attempting to diminish the remaining source of income for many of the mixed-bloods. Congress sought to provide the Indians with an economic foundation that would facilitate their assimilation.[17] To achieve this

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[16] The court below concluded that because of the termination policy, Section 17 should be interpreted to require the payment of income taxes by the mixed-blood group after it was terminated from the Tribe. App., *infra*, 10a. But this ignores the text of Section 17. "Invocation of the 'plain purpose' of legislation at the expense of the terms of the statute itself" is improper. *Board of Governors* v. *Dimension Fin. Corp.*, 474 U.S. 361, 373-74 (1986). Indeed, to the extent that the court below concluded that taxation was proper because of the "assimilationist" nature of the Act, its decision is inconsistent with *Santa Rosa Band of Indians* v. *Kings County*, 532 F.2d 655 (9th Cir. 1975), *cert. denied*, 429 U.S. 1038 (1977). There, the court refused to read a termination statute broadly because it was "not obliged in ambiguous instances to strain to implement a policy Congress has now rejected." *Id.* at 663.

[17] In *Squire* v. *Capoeman*, 351 U.S. 1 (1956), the Court implied an exemption from federal income taxation for proceeds from timber on an incompetent Indian's restricted allotment. In recognition of the same policies that the court below ignored, this Court wrote: "Unless the proceeds of the timber sale are preserved for respondent, he cannot go forward when declared competent with the necessary chance of economic survival in competition with others. This chance is guaranteed by the tax exemption afforded by the General Allotment Act, and the solemn undertaking in the patent." *Id.* at 10.

goal, it was the intent of Congress to deliver to the Indians the full and unencumbered value of their property upon assimilation, not reduced by state and federal taxes.

Twenty years ago, the stockholders of UDC called upon this Court to protect them from a fraudulent scheme to purchase their stock at below-market prices. This Court answered that call. UDC's transfer agent and its employees, who owed a fiduciary duty to the UDC stockholders, "devised a plan and induced the mixed-blood holders of UDC stock to dispose of their shares without disclosing to them material facts" that the sale prices were substantially below market prices. *Affiliated Ute Citizens*, 406 U.S. at 152-53. UDC stockholders again seek relief from this Court. In *Affiliated Ute Citizens*, 406 U.S. at 141, this Court granted certiorari "because of the importance of the issues for Indians whose federal supervision is in the course of termination." Here, the question of taxation is an equally, if nôt more, important question for the Indians who have been terminated.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 28, 1992

APPENDICES

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Nos. 90-4030, 90-4031

UTE DISTRIBUTION CORPORATION, a Utah Corporation; FLOYD and HELEN WILKERSON; HENRY WOPSOCK; SAM N. and SANDRA K. ALOIA; and CHRIS H. DENVER,
Plaintiffs-Appellants/ Cross-Appellees,

v.

UNITED STATES OF AMERICA,
Defendant-Appellee/ Cross-Appellant.

July 16, 1991

Max D. Wheeler (Michael D. Blackburn and David W. Steffensen, with him on the briefs), of Snow, Christensen & Martineau, Salt Lake City, Utah, for plaintiffs-appellants/cross-appellees.

Robert W. Metzler (Shirley D. Peterson, Asst. Atty. Gen., and Gary R. Allen and Richard Farber, Attys., with him on the briefs), Atty., Tax Div., Dept. of Justice, Washington, D.C., for defendant-appellee/cross-appellant; Dee V. Benson, U.S. Atty., of counsel, Salt Lake City, Utah.

Before TACHA and SETH, Circuit Judges, and BRATTON, District Judge.*

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* The Honorable Howard C. Bratton, Senior District Judge for the United States District Court for the District of New Mexico, sitting by designation.

TACHA, Circuit Judge.

Plaintiffs-appellants/cross-appellees Ute Distribution Corporation (UDC) and representative stockholders appeal the district court's ruling that UDC's distributions to its stockholders are subject to federal income tax. The government cross-appeals, claiming the district court erred in refusing to apply its decision retroactively. We exercise jurisdiction under 28 U.S.C. § 1291, reverse the district court's refund of income taxes collected on UDC distributions, and dismiss for lack of jurisdiction appellants' claim for declaratory judgment regarding future taxation of distributions.

I. Background

During the 1950s, federal Indian policy underwent significant reform intended to reduce federal involvement in Indian affairs. In 1954, the 83rd Congress voted to terminate federal supervision over several Indian tribes.[1] Most of these termination acts contained similar provisions relating to the termination of federal supervision over the Indians' property. Typically, the tribal assets consisted of land and trust funds that were divided easily among the members of the tribe.

Congress provided for the termination of the mixed-blood members of the Ute Indian Tribe of the Uintah

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[1] These tribes included: the Southern Paiutes of Utah (Act of Sept. 1, 1954, ch. 1207, 68 Stat. 1099 (repealed 1980) (formerly codified at 25 U.S.C. § 741-760); the Alabama and Coushatta Indians of Texas (Act of Aug. 23, 1954, ch. 831, 68 Stat. 768 (codified at 25 U.S.C. §§ 721-728); sixty-one tribes and bands in western Oregon (Act of Aug. 13, 1954, ch. 773, 68 Stat. 724 (repealed 1977 with respect to Siletz Tribe) (codified as amended at 25 U.S.C. §§ 691-708); the Klamaths of Oregon (Act of Aug. 13, 1954, ch. 732, 68 Stat. 718 (repealed 1978 with respect to Modoc Tribe) (codified as amended at 25 U.S.C. §§ 564-564x); the Menominee Tribe of Wisconsin (Act of June 17, 1954, ch. 303, 68 Stat. 250 (repealed 1973) (formerly codified at 25 U.S.C. §§ 891-902); and the mixed-blood Utes of the Uintah and Ouray Reservations in Utah.

and Ouray Reservation in Utah in the Ute Partition Act (UPA), 25 U.S.C. §§ 677-677aa. The mixed-bloods were tribe members who did not possess enough Indian or Ute Indian blood to fall within the fullblood class and those members who became mixed-bloods by choice under provisions of the UPA. *See* 25 U.S.C. § 677a(c). Unlike other Indian tribes terminated by Congress in 1954, a substantial portion of the Ute tribal assets consisted of subsurface oil, gas, and mineral rights (indivisible assets). These assets were not "susceptible to equitable and practical distribution." *Id.* § 677*o*(a). Congress therefore devised a method of distributing the proceeds of the indivisible assets over an extended period of time to the members of the terminated and non-terminated groups. Under the procedures outlined in the UPA, membership rolls were to be prepared for the fullblood and mixed-blood groups. After these rolls were published, the Tribal Business Committee, representing the fullbloods, and the authorized representative of the mixed-bloods were directed to distribute the divisible assets. The indivisible assets were to remain in government trust and be jointly managed by the Tribal Business Committee and the mixed-bloods' representative.

Pursuant to statutory authorization, the mixed-bloods organized the Affiliated Ute Citizens (AUC) and empowered its board of directors to act as their authorized representative. The mixed-bloods approved a plan for a division of the tribal assets, which later was adopted by the Tribal Business Committee and the AUC. Under this plan, most of the divisible assets were directly transferred to the mixed-bloods. With respect to the indivisible assets, the plan provided for the formation of a corporation responsible for managing these assets for the mixed-bloods. This corporation also would distribute income from the assets to its stockholders.

UDC was formed for these purposes in late 1958. Each mixed-blood listed on the rolls received ten shares of

UDC stock. The stock was freely transferable, except members of the Ute Indian Tribe were given a right of first refusal until August 26, 1964. The termination of the mixed-blood members of the Ute Indian Tribe was completed when the Secretary of the Interior issued a proclamation, effective August 27, 1961, declaring "[a]ll statutes of the United States which affect Indians because of their status as Indians shall no longer be applicable [to the mixed-bloods.]" 26 Fed. Reg. 8042 (1961). This proclamation did not purport to terminate the trust status of the indivisible assets.

For several years, UDC distributions to its stockholders were considered tax-exempt. In 1982, an IRS field agent asserted the probable tax status of the distributions based on section 677p of the UPA. This position was formalized in a letter by an IRS attorney that stated:

> [T]here is no basis for distinguishing distributable and nondistributable assets or property for the purposes of this exemption and that it was the intent of Congress in terminating federal supervision over mixed-blood trust assets to treat the mixed-bloods as non-Indians. Therefore, we believe that any distribution made to a mixed blood after August 27, 1961 was and is subject to income tax.

Based on this reasoning, the IRS assessed taxes on all UDC distributions for tax year 1984.

While the original UDC stockholders were either mixed-bloods or fullbloods who elected to be terminated, the current stockholders include individuals who have inherited stock, mixed-blood and fullblood purchasers, and non-Indian purchasers of stock. Individual stockholders were selected to represent these different categories of stockholders in challenging the IRS decision to tax UDC distributions.[2] UDC and the representative stockholders ex-

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[2] Helen Wilkerson and Sandra Aloia are original mixed-blood stockholders of UDC. Henry Wopsock is a fullblood Ute Indian and

hausted their administrative remedies by unsuccessfully appealing the proposed assessments to the IRS Appeals Office. They paid the taxes, penalties, and interest and filed timely claims for refund, which were denied. Then they filed this suit in federal district court. UDC sought refunds of penalties and interest assessed and collected for tax years 1984 and 1985 and a declaratory judgment that it was not required to file 1099 information returns. The individual stockholders sought refunds of income taxes and interest assessed and collected for tax year 1984 and a declaratory judgment that the distributions are not subject to federal and state taxes.

Following a bench trial, the district court concluded:

> UDC's claim for refund of penalties paid for its failure to file 1099 returns for tax years 1984 and 1985 is granted, and refunds to UDC for those years is ordered. The claims of the individual plaintiffs seeking tax refunds for the year 1984 is also granted. However, commencing with tax year 1989, all distributions of property and income to stockholders of UDC are declared to be taxable, that is, "subject to the same taxes, State and Federal, as in the case of non-Indians."

Ute Distribution Corp. v. United States, 721 F.Supp. 1202, 1209 (D.Utah 1989). In the final order, the district court awarded refunds to UDC and the individual shareholders and granted the government a declaratory judgment. All parties filed timely notices of appeal.

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an original stockholder of UDC who elected to be terminated from the tribe pursuant to the UPA. He acquired five additional shares of UDC stock by inheritance. Chris Denver is a non-Indian who purchased three shares of UDC stock. Floyd Wilkerson and Sam Aloia are also parties to this appeal. They filed joint tax returns with their wives and have been made parties for that reason.

II. Discussion

A. *Jurisdiction Over Claims for Declaratory Judgment*

The government contends the district court should not have exercised jurisdiction over appellants' claims for declaratory judgment. Declaratory judgment actions relating to federal taxes are not permitted. 28 U.S.C. § 2201; *see also* 26 U.S.C. § 7421(a). The purpose of this prohibition is protection of the government's need to assess and collect taxes expeditiously without pre-enforcement judicial interference. *See South Carolina v. Regan*, 465 U.S. 367, 374-75, 104 S.Ct. 1107, 1112-13, 79 L.Ed.2d 372 (1984); *Bob Jones Univ. v. Simon*, 416 U.S. 725, 736-37, 94 S.Ct. 2038, 2045-46, 40 L.Ed.2d 496 (1974). An individual seeking to challenge the imposition of a tax must pursue his claim in a suit for refund. *See Lowrie v. United States*, 824 F.2d 827, 830 (10th Cir. 1987).

Appellants pursued the proper procedure for challenging the imposition of the tax on UDC distributions. They paid the tax and then sought a refund. The district court, however, did not have jurisdiction to consider appellants' accompanying claims for declaratory judgment.

Additionally, the government argues the appellants have failed to join the appropriate state taxing authority as an indispensable party to their request for declaratory judgment. The government did not raise this issue below. We need not address this question because we dismiss appellants' claims for declaratory judgment. These claims are dismissed.

B. *Taxation of UDC Distributions*

The government argues appellants are not entitled to appeal the district court's judgment because that court awarded the entire amount of refunds sought by appellants. When one party files a notice of appeal challenging

the district court's decision, the opposing party is entitled to cross-appeal on all other issues litigated below. *See W.W. Windle Co. v. Commissioner*, 550 F.2d 43, 45 n. 2 (1st Cir), *cert. denied*, 431 U.S. 966, 97 S.Ct. 2923, 53 L.Ed.2d 1062 (1977). The rule limiting issues raised on appeal merely restricts a party with a judgment in his favor from seeking appellate review of "findings he deems erroneous which are not necessary to support the decree." *Electrical Fittings Corp. v. Thomas & Betts Co.*, 307 U.S. 241, 242, 59 S.Ct. 860, 83 L.Ed. 1263 (1939).

Here, the government commenced this appeal by filing a notice of appeal challenging the district court's prospective application of its ruling. Appellants may challenge the district court's ruling on the taxation of distributions because it is an integral part of the judgment. The issue of statutory interpretation we face here pursuant to section 1291 appellate jurisdiction is unlike the situation this court faces in reviewing issues unnecessary to a final decision of the tax court pursuant to 26 U.S.C. § 7482(a). *See, e.g., Van Roekel v. Commissioner*, 905 F.2d 80 (5th Cir. 1990); *W.W. Windle Co.*, 550 F.2d 43.

To determine whether the district court properly ordered the requested refunds, we must first consider whether the court correctly interpreted the statute to subject UDC distributions to federal income tax. Section 677p of the UPA addresses the tax status of property distributed to the mixed-bloods. This provision states in part:

> No distribution of the assets made under the provisions of this subchapter shall be subject to any Federal or State income tax. . . . Property distributed to the mixed-blood group pursuant to the terms of this subchapter shall be exempt from property taxes for a period of seven years from August 27, 1954, unless the original distributee parts with title thereto. . . . After seven years from August 27, 1954, all property distributed to the mixed-blood members of

> the tribe under the provisions of this subchapter, and all income derived therefrom by the individual, corporation, or other legal entity, shall be subject to the same taxes, State and Federal, as in the case of non-Indians; except that [the UDC] shall not be subject to corporate income taxes.

We review de novo the question whether the UDC distributions are taxable under this provision. *Absentee Shawnee Tribe of Indians v. State of Kansas*, 862 F.2d 1415, 1416 (10th Cir.1988), *cert. denied*, 490 U.S. 1046, 109 S.Ct. 1955, 104 L.Ed.2d 424 (1989).

When statutory language is unambiguous, the plain language controls except in "rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intention of its drafters." *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571, 102 S.Ct. 3245, 3250, 73 L.Ed.2d 973 (1982). Canons directing a court to construe a statute for the benefit of a particular group, such as Indians, only apply when there are doubtful expressions or the statute is silent on the issue. *See United States v. Felter*, 752 F.2d 1505, 1511 (10th Cir. 1985); *United States v. Anderson*, 625 F.2d 910, 913 (9th Cir. 1980); *cert. denied*, 450 U.S. 920, 101 S.Ct. 1367, 67 L.Ed.2d 347 (1981). Further, we do not defer to an agency interpretation of a statute when that statute is not ambiguous. *Board of Governors of the Fed. Reserve System v. Dimension Fin. Corp.*, 474 U.S. 361, 368, 106 S.Ct. 681, 685-86, 88 L.Ed.2d 691 (1986); *Chevron, USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-44, 104 S.Ct. 2778, 2781-83, 81 L.Ed.2d 694 (1984).

Congress expressed an intent in section 677p to make distributions received after a specific date subject to federal income tax. Although the provision indicates initial distributions are tax-exempt, the provision also states that this limited tax exemption expires on August 27,

1961. According to the plain language of section 677p, UDC shareholders must pay federal income tax on all distributions received after August 27, 1961.

We must follow the unambiguous language of the statute unless the legislative history reveals a clear contrary intent that UDC distributions are not taxable. The legislative history of the 1954 enactment of the UPA does not address the tax status of distributions of income from the indivisible assets to the mixed-bloods. *See* 1954 U.S. Code. Cong. & Admin.News 3352, 3355. In 1956, Congress amended section 677p of the UPA to create a corporate income tax exemption for the UDC. The House and Senate Reports state this amendment was intended "to preserve the tax-exempt status of the distributions from the trust funds held by the United States Government on the principle that the corporation would merely act as a conduit for the transmission of funds received from the Government to the members of the mixed-blood group." H.R.Rep. No. 2744, 84th Cong., 2d Sess. 2 (1956); S.Rep. No. 2432, 84th Cong., 2d Sess. 2 (1956).

Included in these reports is a letter from the Assistant Secretary of the Interior to the chairman of the Senate committee considering the amendment. This letter states:

> The present act provides that the initial distribution of tribal assets (except interest earned on funds in the United States Treasury) to the members of the mixed-blood group shall not be subject to income taxes. This is proper because the distribution represents an original tribal capital asset. . . . The corporation thus represents merely an interim step pending the ultimate division of the undivided assets. Inasmuch as the ultimate division and distribution of those assets will not be subject to income tax, we believe that it is proper to exempt the interim corporation that will be organized principally for the

> convenience of the government from corporate income taxes.

H.R.Rep. No. 2744, 84th Cong., 2d Sess. 3 (1956); S.Rep. No. 2432, 84th Cong., 2d Sess. 3 (1956).

The language contained in these reports and the Department of Interior letter only refer to a limited exemption for distributions of assets. When these documents were prepared in 1956, all distributions to the mixed-bloods were tax-exempt under section 677p, and they did not lose this status until 1961. By 1961, the mixed-blood members had received their distribution of shares of stock in UDC tax-free. Nothing in the legislative history contradicts the plain language of section 677p indicating income derived from this stock is subject to federal income taxation after August 27, 1961.

Further, section 677p reflects the general policy of enabling Indians to participte fully in the rights and responsibilities of United States citizens. Congress expressed this policy as follows:

> [I]t is the policy of Congress, as rapidly as possible to make the Indians . . . subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States, to end their status as wards of the United States and to grant them all of the rights and prerogatives pertaining to American citizenship. . . .

H.R.Con.Res. 108, 83d Cong., 1st Sess. (1954). For the mixed-bloods, the application of this policy in section 677p would require them to assume the responsibility of paying taxes on all income received after their membership in a distinct Indian tribe was terminated. The district court properly concluded UDC income distributions made after August 27, 1961 are subject to federal income tax.

Appellants contend section 677p exempts all UDC distributions from federal income tax whether they are

made before or after August 27, 1961. They contend UDC distributions are exempt from federal income tax because the general income tax exemption found in the first sentence is not modified as it relates to income distributions derived from the indivisible assets. Although the statute provides that property distributed to the mixed bloods shall be subject to the same state and federal taxes imposed on non-Indians after 1961, appellants argue the phrase "property distributed" only refers to property that previously had been distributed tax-free. This tortured construction of section 677p is contrary to the statute's plain language. Section 677p's tax exemption expires on August 27, 1961 with respect to "all property distributed;" the provision does not state the exemption expires on that date only as to property previously distributed tax free.

Appellants also argue the legislative history of other termination acts enacted during the 1950s reveals an intent that distributions to Indians remain tax-free in perpetuity. Although the tax provisions of other acts may exempt the distribution of tribal assets from federal taxation, *see, e.g.*, 25 U.S.C. § 564j (Klamaths of Oregon); 25 U.S.C. § 749 (Paiutes of Utah); 25 U.S.C. § 699 (sixty tribes and bands in western Oregon); 25 U.S.C. § 898 (Menominee Tribe of Wisconsin) (repealed 1973), the tax provision in the UPA differs from those in the other termination acts. Section 677p provides that distributions made to the mixed-bloods prior to their termination shall be tax-exempt, while those subsequently made are subject to federal and state taxes. As noted previously, the termination of the Ute Indians involved the unique problem of distributing indivisible assets. In enacting section 677p, Congress was faced with the problem of partitioning the tribal property between the terminated and non-terminated groups. This provision with its limited exception represents Congress' resolution of the taxation issues involved in the distribution of indivisible tribal assets.

C. *Taxpayers' Right to Refunds*

Although the district court properly determined the plain language of section 677p made the distributions subject to federal income tax, the court ordered refunds for the 1984 tax year, purporting to apply its decision only prospectively. The court stated:

> Although today this court has ruled that UDC distributions are taxable, as a matter of fundamental fairness this ruling shall apply prospectively only. That is, the taxable status of UDC distributions as applied to individual shareholders shall commence with the tax year 1989. . . . Plaintiffs paid the 1984 assessments under protest and in spite of the long-standing position of the Department of the Interior that such distributions are nontaxable. Under such circumstances the individual plaintiffs and other UDC stockholders are not charged with notice of the taxable status of such distributions prior to this decision.

Ute Distribution Corp., 721 F.Supp. at 1208-09 n. 23.

Section 677p unambiguously imposes a duty on UDC stockholders to pay federal income tax on distributions received after August 27, 1961. This is not a case where the district court was free to determine whether to apply its decision retroactively or prospectively only. The court was bound, as we are, by the specific statutory mandate establishing the date after which taxes will be imposed. Notwithstanding the long period of IRS forbearance from collection of taxes, the statute is clear regarding the legal liability for taxes on the interests involved here beginning on August 27, 1961.

There is nothing fundamentally unfair about requiring these stockholders to satisfy this obligation for the 1984 tax year. Section 677p granted the mixed-bloods a tax exemption for a limited period of time. Congress declared the mixed-bloods would assume the privileges and

duties of citizenship, including the payment of federal income taxes, after August 27, 1961. The district court erred in applying its decision only to future tax years and in granting the refunds.

We REVERSE the district court's award of refunds of income taxes assessed and collected on the UDC distributions and DISMISS the claims for declaratory judgment. The district court's other rulings have not been challenged on appeal. We REMAND to the district court for entry of an order consistent with this opinion.

APPENDIX B

UNITED STATES DISTRICT COURT
D. UTAH, C.D.

Civ. No. 88-C-0023G

UTE DISTRIBUTION CORPORATION, a Utah corporation, FLOYD and HELEN WILKERSON, HENRY WOPSOCK, SAM N. and SANDRA K. ALOIA, and CHRIS H. DENVER,
Plaintiffs,

v.

UNITED STATES OF AMERICA,
Defendant.

July 27, 1989

Max D. Wheeler, Michael D. Blackburn and David Steffensen, Salt Lake City, Utah, for plaintiffs.

Kirk C. Lusty, Washington, D.C., for defendant.

MEMORANDUM DECISION AND ORDER

J. THOMAS GREENE, District Judge.

This matter came on regularly for trial before the court sitting without a jury on November 7 and 8, 1988. Max D. Wheeler, Michael D. Blackburn and David W. Steffensen represented the plaintiffs, and Kirk C. Lusty represented the defendant. The parties presented evidence and the court heard arguments of counsel. The court took the matter under advisement, but the parties were granted leave to file supplemental memoranda, with

the understanding that upon filing thereof the case was to be submitted for decision by the court without further argument. Such further memorandums have been filed, and now being fully advised, the court enters its memorandum decision and order.

NATURE OF THE ACTION

This is an action instigated by the Ute Distribution Corporation (hereinafter "UDC") and four of its stockholders. Plaintiffs Helen Wilkerson and Sandra Aloia are original mixed-blood stockholders of UDC; Henry Wopsock is a full-blood Ute Indian and an original stockholder of UDC who elected to be terminated from the tribe pursuant to the Act. He also acquired five additional shares of UDC stock by inheritance; Chris Denver is a non-Indian who purchased three shares of UDC stock. These individual plainitffs seek a refund of federal income taxes assessed against them on income distributions received from UDC for the tax year 1984. Plaintiff UDC seeks an order from this court which would require the IRS to refund monies assessed against UDC under 26 U.S.C. §§ 6652(a) and 6678(b)(1) for its failure to file Form 1099 in tax years 1984 and 1985. Plaintiff UDC also seeks a declaratory judgment that it has no obligation under 26 U.S.C. §§ 6041(a) and 6042(c) to file Form 1099 for payments to be made in the future.[1]

I. FACTUAL BACKGROUND

A. *Assets Not Susceptible to Equitable and Practicable Distribution under the Management of Ute Distribution Corporation (UDC)*

During the 1950s federal Indian policy underwent significant reform when Congress passed legislation to

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[1] Plaintiffs have exhausted their administrative remedies with the IRS by appealing to the IRS Appeals Office. Moreover, each individual plaintiff and UDC have paid in full the respective taxes and penalties with interest.

reduce federal involvement in Indian affairs.[2] In this regard, in 1954, Congress passed the Ute Partition Act (hereinafter the "Act"), codified as amended at 25 U.S.C. §§ 677-677aa (1982).[3] The purposes of the Act were (1) to partition and distribute the Ute Indian Tribal assets of the Uintah and Ouray Reservation in Utah between the mixed-blood and full-blood groups; (2) to terminate federal supervision of the mixed-blood members' property; and (3) to assist the full-blood members to prepare for termination of federal supervision over their property. *Id.* § 677. On August 27, 1961, federal supervisory relationship over the mixed-bloods was ended, and the Ute Indian Tribe consisted only of those classified as blood members.[4] However, federal supervision over the

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[2] *See* Wilkinson & Biggs, "The Evolution of the Termination Policy," 5 American Indian L.Rev. 139, 145-165 (1977); F. Cohen, Handbook of Federal Indian Law 152-80 (1982).

[3] There has been a considerable amount of litigation regarding the Ute Partition and Termination Act. *See Affiliated Ute Citizens v. United States*, 406 U.S. 128, 92 S.Ct. 1456, 31 L.Ed.2d 741 (1972); *Miera v. First Security Bank*, 776 F.2d 902 (10th Cir.1985); *United States v. Felter*, 752 F.2d 1505 (10th Cir.1985), *aff'd*, 546 F.Supp. 1002 (D.Utah 1982); *Ute Indian Tribe v. Probst*, 428 F.2d 491 (10th Cir.), *cert. denied*, 400 U.S. 926, 91 S.Ct. 189, 27 L.Ed.2d 186 (1970); *Chapoose v. Clark*, 607 F.Supp. 1027 (D.Utah 1985); *Hackford v. First Security Bank*, 521 F.Supp. 541 (D.Utah. 1981), *aff'd*, No. 81-1863, unpublished slip op., 1983 WL 20180 (10th Cir. Jan. 31, 1983).

[4] In *Affiliated Ute Citizens v. United States*, 406 U.S. 128, 133 n. 3, 92 S.Ct. 1456, 1462 n. 3, 31 L.Ed.2d 741 (1972), the Court stated that, "[f]or purposes of consistency and clarity" it felt compelled to use the statutory terms "full-blood" and "mixed-blood." Pursuant to the Act, the Ute tribe was divided into two groups: full-blood members (those with one-half degree of Ute Indian blood and total Indian blood in excess of one-half) and mixed-blood members (those with insufficient Indian or Ute blood to qualify as full-blood Utes, and those full-blood Utes who elected to be treated as mixed-blood members). *Id.* § 677a(b) and (c). The Act required the preparation of final tribal rolls listing the full-blood and mixed-blood members of the Tribe. *Id.* § 677g. On April 5, 1956, these rolls

mixed-blood members and their property was not terminated "as to [their] remaining interest in . . . tribal assets not suseptible to equitable and practicable distribution." *Id.* 677*o*(a).[5] Those assets were to be managed jointly by the Tribal Business Committee on behalf of the full-bloods and the authorized representative of the mixed-blood group, and the proceeds therefrom were to be "divided between the full-blood and mixed-blood groups in direct proportion to the number of persons comprising the final membership roll of each group. . . ." *Id.* § 677i.

A plan for the division and distribution of assets which were distributable i.e., real and personal property, was adopted by both groups and approved by the Secretary of Interior. *Id.* § 677*l*. UDC was to receive all income belonging to the mixed-bloods from all other assets not "susceptible to an equitable and practicable distribution,"

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were published in the Federal Register, listing 490 tribal members as mixed-bloods and 1,314 tribal members as full-bloods. 21 Fed.Reg. 2208-12. The Act provided that upon publication of the roles, "the tribe shall thereafter consist exclusively of full-blood members. Mixed-blood members shall have no interest therein except as otherwise provided in this subchapter." *Id.* § 677d.

[5] The statute provides in part that:

> *When any mixed-blood member of the tribe has received his distributive share of the tribal assets distributed to the mixed-blood group* under the provisions of section 677i of this title, . . . the Secretary is authorized and directed to immediately *transfer to him unrestricted control of all other property held in trust for such mixed-blood member by the United States,* and shall further remove all restrictions on the sale or encumbrance of trust or restricted property owned by such member of the tribe, and Federal supervision of such member and his property shall thereby be terminated, *except as to his remaining interest in tribal property in the form of any unadjudicated or unliquidated claims against the United States, all gas, oil and mineral rights of every kind, and all other tribal assets not susceptible to equitable and practicable distribution, all of which shall remain subject to the terms of this subchapter, notwithstanding anything contained herein to the contrary.*

25 U.S.C. § 677*o*(a) (emphasis added).

as well as all income from unajudicated or unliquidated claims against the United States, and all income from oil, gas and mineral rights.[6] As part of the distribution plan, each mixed-blood was to receive ten shares of stock which entitled the holder to vote for mixed-blood delegates and to share in the proceeds of the jointly managed assets. However, when a mixed-blood sold his or her shares that person no longer would have a voice in management of the undivided assets or any rights therein.[7]

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[6] The mixed-bloods organized under the name Affiliated Ute Citizens of Utah (AUC). The AUC was to represent the mixed-bloods throughout the entire termination process. The AUC's board of directors delegated to UDC all their powers "for the purposes of managing jointly with the Tribal Business Committee of the full-blood group . . . all unadjudicated or unliquidated claims against the United States, all gas, oil and mineral rights of every kind, and all other assets not susceptible to equitable and practicable distribution . . ." The purposes of UDC are set forth in Art. IV of the Articles of Incorporation of the Ute Distribution Corporation, as follows:

> [T]o manage jointly with the Tribal Business Committee . . . all unadjudicated or unliquidated claims against the United States, all gas, oil and mineral rights of every kind, and all other assets not susceptible to equitable and practicable distribution to which the mixed-blood members . . . may hereafter become entitled . . . and to receive the proceeds therefrom and to distribute the same to the stockholders of this corporation as herein provided.

See also Preamble to the Articles of Incorporation of Ute Distribution Corporation.

[7] Articles of Incorporation of UDC, Art. VI, provides:

> The stock of the corporation is subject to transfer, devise or descent. If a mixed-blood member of said tribe, or any stockholder herein disposes of his stock, he will no longer have a vote or any control in the affairs of the corporation, or be entitled to share in the distribution of the proceeds as herein before provided, unless and until he thereafter again becomes a stockholder in the corporation. Transferees, legatees, and heirs of any stock in the corporation shall acquire all rights to which a stockholder is entitled, including voting rights and the right to share in the distribution of the income or proceeds available for such distribution.

B. *Taxation of UDC Distributions Which Were Derived From Tribal Assets Not Susceptible to Equitable and Practicable Distribution*

Department of Interior policy over the years has been to regard UDC distributions as tax-exempt.[8] The Internal Revenue Service has asserted a different position, but none of the plaintiffs or persons similarly situated have ever paid taxes on their UDC distributions, except under protest in connection with this current litigation. In the fall of 1982, Mr. Juan Bailli, an IRS field agent, asserted for the first time the probable taxable status of UDC distributions in the hands of stockholders and that UDC might have to file informational returns. This position was later formalized in an opinion letter dated March 3, 1983, by Randal G. Durfee, an IRS attorney who was assigned to investigate the tax consequences surrounding UDC distributions. In that opinion letter, Mr. Durfee determined:

> [T]here is no basis for distinguishing distributable and nondistributable assets or property for the purposes of this exemption and that it was the intent of Congress in terminating federal supervision over the mixed-blood trust assets to treat the mixed-bloods as non-Indians. Therefore, we believe that any distribution made to a mixed-blood after August 27, 1961 was and is subject to income tax.[9]

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[8] This policy and position of the Department of Interior, which has the oversight responsibility for the Ute Indian Tribe and UDC, is set forth in a letter from William R. McConkie for Reid W. Nielsen, Regional Solicitor, to the Superintendent, Uintah and Ouray Agency (February 10, 1983).

[9] *See* letter from Randal G. Durfee, District Counsel to District Director, Salt Lake City (March 3, 1983). In further explaining his conclusion that all distributions made from the non distributed assets became taxable after August 1961, Mr. Durfee testified at trial as follows:

C. *Filing of Tax Returns or Forms by UDC*

Agent Durfee also held in his written opinion that UDC was required to file 1099 returns under Treasury Regulation § 1.6041-1(b). During cross examination at trial, however, Mr. Durfee admitted that UDC did not qualify under any of the enumerated provisions of that regulation, nor was it a corporation engaged in the pursuit of gain or profit.[10] Further, when Mr. Durfee was presented with a "1099 DIV" form he agreed that UDC distributions could not properly be classified as "dividends" nor could its distributions accurately be recorded on any portion of the "1099 MIS" form.[11] Mr. Durfee

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Q. [Plaintiffs counsel] Did you rely on any legal authority or precedent or legislative history on concluding the seven year provision applied also to the trust properties?

A. Only the legislative history behind the Act dealing with the Ute Tribe.

Q. And what legislative history specifically?

A. I don't remember. It was the general tone and tenor of the Act or the intention to terminate the stewardship with respect to the mixed-blood Indians.

Trial Transcript (Tr) Vol 1 at 75.

[10] Tr. Vol. 1 at 72-77.

[11] Tr. Vol. 1 at 78. In supporting the proposition that UDC distributions are not properly classified as dividends, Mr. Glen Lambert, a tax accountant with the firm of Deloitte, Haskins & Sells, testified:

Q. [Plaintiff's counsel] Now Mr. Lambert, you are familiar, are you not, with the various 1099 forms that are prepared by the IRS for filing?

A. Yes.

Q. And you heard discussion about the 1099 DIV yesterday?

A. Right.

Q. Would you agree with Mr. Durfee that is not a form that fits UDC's function?

A. Yes, I would.

Q. In other words, the distributions, whatever they are, they are not dividends?

A. I agree with that, yes.

Tr. Vol. 2 at 35.

agreed that UDC is a totally unique corporation unlike any in the United States.[12]

UDC advisors met several times with the IRS, culminating in a meeting on June 21, 1984 with John Oys, then Acting District Director for the IRS, who told UDC advisors that the IRS would consider dropping further attempts to assess taxes on UDC distributions. However, in August 1986, the IRS began audits of UDC and its stockholders.

II. ANALYSIS

A. *Taxation of Distributions by UDC*

The Ute Partition Act governs the taxable status of distributions by UDC. Section 677p of the Act provides:

> *No distribution of the assets made under the provisions of this subchapter shall be subject to any Federal or State income tax: Provided;* That so much of any cash distribution made under this subchapter as consists of a share of any interest earned on funds deposited in the Treasury of the United States shall not by virtue of this subchapter be exempt from individual income tax in the hands of the recipients for the year in which paid. *Property distributed to the mixed-blood group pursuant to the terms of this subchapter shall be exempt from property taxes for a period of seven years* from August 27, 1954, unless the original distributee parts with title thereto, either by deed, descent, succession, foreclosure of mortgage, sheriff's sale or other conveyance: *Provided;* That the mortgage, hypothecation, granting of right-of-way, or other similar encumbrance of said property shall not be construed as a conveyance subjecting said property to taxation under the provisions of this section. *After seven years*

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[12] Tr. Vol. 1 at 61, 79.

> *from August 27, 1954, all property distributed to the mixed-blood members of the tribe* under the provisions of this subchapter and *all income derived therefrom* by the individual, corporation, or other legal entity, *shall be subject to the same taxes, State and Federal, as in the case of non-Indians;* except that any corporation organized by the mixed-blood members for the purpose of aiding in the joint management with the tribe and in the distribution of unadjudicated or unliquidated claims against the United States, all gas, oil, and mineral rights of every kind, and all other assets not susceptible to equitable and practicable distribution *shall not be subject to corporate income taxes.*

(Emphasis added.)

Plaintiffs contend that the language of section 677p grants any UDC stockholder, whether a full-blood, mixed-blood or non-Indian, a complete tax exemption on distributions of income generated by undivided tribal assets not susceptable to equitable and practicable distribution, which assets continue to be held in trust by the United States government.[13] Plaintiffs urge that *only property which is actually distributed by transfer of title* to the mixed-bloods, and *the income directly derived from such property*, is susceptible to taxation. The express language

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[13] In *Affiliated Ute Citizens v. United States*, 406 U.S. 128, 142-43, 92 S.Ct. 1456, 1466-67, 31 L.Ed.2d 741 (1972), the Supreme Court stated that "There is, and can be, no dispute that the United States holds title to the land, including the mineral interest, constituting the Uintah and Ouray Reservation . . . Although the interest in the mineral estate that AUC seeks to have conveyed pro rata to the individual mixed-blood perhaps could be made the subject of an allotment, it has never been so subjected. Neither is it appurtenant to an allotment. The interest relates to the tribal land of the reservation. It remains tribal property. Further, § 10 of the 1954 Act, 25 U.S.C. § 677i, itself contemplates and provides specifically for the non-allocation of that interest." *See also Maldonado v. Hodel*, 683 F.Supp. 1322, 1329 (D.Utah 1988).

of section 677p provides for an exemption from *property* taxes on assets distributed by transfer of title during the period 1954-1961. Plaintiffs admit that the said *property tax exemption* does not apply to property distributed by passage of title after 1961. However, plaintiffs submit that the general exemption granted by the statute in the first sentence of section 677p is not modified or removed by any subsequent provision of section 677p as it relates to income distributions derived from assets held in trust by the government.

Defendant agrees that property distributed by transfer of title prior to August 1961 is expressly exempt from property taxes, but asserts that *all* property distributed after that time is taxable whether such property is distributed by transfer of title or otherwise. Defendant's position simply is that all UDC distributions to its shareholders after August 1961, the initial seven year period, are fully taxable.

Plaintiffs' position rests upon an interpretation of "property distributed" within the meaning of section 677p as excluding any distributions of income derived from nondistributable property held in trust by the government. The term "property distributed" appears in the statute twice, once with reference to distributions during the first seven year period after enactment of the statute, and once with reference to distributions after the initial seven year period. It is clear under the statute that "property distributed" to mixed bloods during the first seven years after enactment of the statute, until 1961, "shall be exempt from *property* taxes." On the other hand, it is equally clear under the statute that "*all* property distributed" after the seven year period and "all income derived therefrom . . . shall be subject to the same *taxes*, State and Federal, as in the case of non-Indians." The only exemption granted under the statute after the initial seven year period is as to *corporate income taxes* which might otherwise be imposed upon corporations (such as UDC) organized by the mixed-blood

members to aid in distributions, among other things, of assets "not susceptible to equitable and practicable distributions." Under the Act, the term "asset" is parallel in meaning with the term "property" and expressly embraces property held in trust by the United States.[14]

This court rejects plaintiffs' contention that the term "property distributed," as it appears the second time in section 677p relating to distributions after the initial seven year period, must be read as excluding distributions derived from property held in trust by the U.S. Government.[15] Likewise, this court rejects the argument that it is bound by the apparent prior administrative practice of not challenging UDC distributions as taxable.[16]

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[14] The Act defines "asset" to mean "all property of the Tribe, real, personal or mixed, whether held by the tribe or by the United States in trust for the tribe. . . ." 25 U.S.C. § 677a.

[15] It is urged by plaintiffs that since neither mixed-bloods nor corporations organized for their benefit were to receive "title" to any of the nondivisible assets under 25 U.S.C. § 677i & § 677o, Congress must have used the term "property distributed" in § 677p to distinguish between assets distributed by passage of title and nondivisible assets which remain in government trust. From this premise plaintiffs argue that as to distributions of property beyond 1961, the term "property distributed" only has application to assets which may be distributed by passage of title. Plaintiffs argue that Congress expressly exempted property capable of physical division and distribution by transfer of title from *property* taxes during the first seven years, and that its intent was to end that exclusion as applied to such "property distributed" after the initial seven year period, leaving undisturbed the initial exemption as applied to distributions of income derived from assets held in trust. Under the plain reading of the statute, however, section 677p authorizes the imposition of all applicable taxes, whether property taxes or otherwise, upon *all* property distributed after the initial seven year period, including income distributions, whether or not the distributions require transfer of title and irrespective of whether such distributions are derived from or relate to properties the title of which is retained by the U.S. Government under a trust arrangement.

[16] The past administrative history does not rise to the level of clear administrative interpretation by way of published regulations

Also, the court is unaware of any reason not to tax UDC property distributions to mixed bloods beyond 1961 based upon their status as "mixed bloods," [17] nor can this court perceive a compelling public policy which requires non taxability under section 677p upon the basis that Indian statutes are typically construed liberally.[18]

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as distinguished from unpublished policies twice removed from the statement of congressional policy set forth in the statute. In any event, courts are not bound to follow administrative determinations which are found to be inconsistent with the statutory mandate or that frustrate the congressional policy underlying a statute. *United States v. Felter*, 546 F.Supp. 1002 (D.Utah 1982) *aff'd*, 752 F.2d 1505 (10th Cir.1985) ; *Plateau, Inc. v. Department of Interior*, 603 F.2d 161 (10th Cir.1979). See Fn. 19.

[17] Here, the status of *any person* as a stockholder of UDC controls. Mixed bloods who were original stockholders were allowed to transfer their shares with the understanding that thereafter they would have no further rights based upon those shares. "Transferees, legatees and heirs" were to acquire "all rights to which a stockholder is entitled, including voting rights and the right to share in the distribution of the income or proceeds available for such distribution." Articles of Incorporation of UDC, Article VI. The case of *United States v. Felter*, 546 F.Supp. 1002 (D.Utah 1982), *aff'd*, 752 F.2d 1505 (10th Cir.1985) is inapposite. In that case the Tenth Circuit held that a mixed-blood Ute Indian who was terminated under the Ute Partition Act did not lose her status as an Indian for purposes of hunting and fishing on reservation lands without a Tribal permit. The issue of status as an Indian is not present in the case at bar.

[18] The court recognizes the "eminently sound and vital canon" set forth in *Northern Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649, 655 n. 7, 96 S.Ct. 1793, 1797, n. 7, 48 L.Ed.2d 274 (1976), that "statutes passed for the benefit of dependent Indian tribes . . . are to be liberally construed, doubtful expressions being resolved in favor of the Indians." *Bryan v. Itasca County, Minn.*, 426 U.S. 373, 96 S.Ct. 2102, 48 L.Ed.2d 710 (1976). Also, the court is not unaware of the general rule that " '[d]oubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith.' " *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973), *quoting*, *Carpenter v. Shaw*, 280 U.S. 363, 367, 50 S.Ct. 121, 122, 75 L.Ed. 478 (1930). These general

Insofar as it relates to the taxable status of property distributions after 1961, the statute in question is unambiguous. The statute is neither silent nor ambiguous in that regard, and the court determines that Congress left no gap to be filled by administrative interpretation.[19] Under the plain reading of the statute, *all* property which is distributed to the mixed-bloods is subject to "the same taxes, State and Federal, as in the case of non-Indians." This embraces distributions of income from trust assets as well as all other property distributed to ULDC stockholders, including mixed-bloods. This court so holds.

Although today this court has ruled that UDC distributions are taxable, as a matter of fundamental fairness this ruling shall apply prospectively only. That is, the taxable status of UDC distributions as applied to individual shareholders shall commence with the tax year 1989.

B. *Filing Requirements of UDC*

Plaintiff UDC contends that it is entitled to a refund of tax penalties assessed against it for failing to file 1099s in tax years 1984 and 1985. UDC argues that since it does not generate profits or earnings for its shareholders, and does not have any control in determining how the income is distributed, it is not a "trade or busi-

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expressions have no compelling application in the circumstances of this case.

[19] Where Congress has directly spoken to the precise question, agencies as well as the court must give effect to such unambiguously expressed intent. Here, Congress has directly spoken to the taxability of all property distributed after the initial seven year period. See *Chevron USA, Inc. v. Natural Resource Defense Council*, 467 U.S. 837, 842-844, 104 S.Ct. 2778, 2781-82, 81 L.Ed.2d 694 (1984); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 431-32, 107 S.Ct. 1207, 1213-14, 94 L.Ed.2d 434 (1987). *See also Salt Lake City, et al. v. Western Area Power Administration, et al.*, Slip op. C86-1000G at 2-32, 1988 WL 167244 (1988).

ness" under 26 U.S.C. § 6041(a).[20] It is further argued that UDC has no duty to file a return pursuant to 26 U.S.C. § 6042(c) since its distributions are not properly classified as "dividends" because the income produced does not originate from corporate earnings or profits.[21] UDC maintains that it is merely a conduit by which the income generated from the undivided tribal assets are passed on to the individual shareholders.

The term "trade or business" is not defined in the Internal Revenue Code or in its accompanying regulations. Further, the Code sections and Regulations cited by defendant provide no additional insight in helping the court resolve the issue since none of them can be construed to apply to such a unique corporation as UDC. Indeed, the evidence presented at trial contradicts defendant's contention that UDC is engaged in a "trade or business." "Dividend" is defined to mean any distribution of property made by a corporation to its shareholders "out of its earning and profits of the taxable year."[22] The IRS admits that UDC distributions to its stockholders do not constitute "dividends" because they do not originate from any corporate earnings or profits. Since UDC does not operate as a "trade or business," and since its distributions do not constitute "dividends," or other income, this court holds that UDC need not file 1099 informational tax returns or other forms.

Based upon the foregoing analysis, plaintiff UDC's claim for refund of penalties paid for its failure to file

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[20] 26 U.S.C. § 6041(a) requires all persons engaged in a "trade or business" who make payments of $600.00 or more in a tax year to file a 1099 return.

[21] 26 U.S.C. § 6042(a)(1) and (2) requires persons who make payments of dividends of $10.00 or more to any other person during any calendar year to file a return with the Secretary of the Treasury showing the name and address of the recipient and the amount of the payment.

[22] 26 U.S.C. § 316.

1099 returns for tax years 1984 and 1985 is granted, and refunds to UDC for those years is ordered. The claims of the individual plaintiffs seeking tax refunds for the year 1984 is also granted.[23] However, commencing with the tax year 1989, all distributions of property and income to stockholders of UDC are declared to be taxable, that is, "subject to the same taxes, State and Federal, as in the case of non-Indians."

Counsel for defendant is directed to prepare and lodge with the court a form of judgment consistent with this Memorandum Decision and Order, after compliance with local Rule 13(e).

IT IS SO ORDERED.

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[23] Plaintiffs paid the 1984 assessments under protest and in spite of the longstanding position of the Department of the Interior that such distributions are non taxable. Under such circumstances the individual plaintiffs and other UDC stockholders are not charged with notice of the taxable status of such distributions prior to this decision.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Nos. 90-4030
90-4031

UTE DISTRIBUTION CORPORATION, a Utah corporation; FLOYD WILKERSON, HELEN WILKERSON, HENRY WOPSOCK, SAM N. ALOIA; SANDRA K. ALOIA, CHRIS H. DENVER,

Plaintiffs-Appellants,
Cross-Appellees,

v.

UNITED STATES OF AMERICA,
Defendant-Appellee,
Cross-Appellants.

ORDER

Entered December 2, 1991

Before TACHA, SETH, Circuit Judges, and BRATTON, District Judge.*

This matter comes on for consideration of appellant's suggestion for rehearing en banc, which the court treats

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* Honorable Howard C. Bratton, Senior District Judge for the United States District Court for the District of New Mexico, sitting by designation.

as a petition for rehearing and suggestion for rehearing en banc.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

Entered for the Court

ROBERT L. HOECKER,
Clerk

/s/ Patrick Fisher
By: PATRICK FISHER
Chief Deputy Clerk

APPENDIX D

UNITED STATES DEPARTMENT
OF THE INTERIOR

OFFICE OF THE SOLICITOR
Intermountain Region
Suite 6201, Federal Building
125 South State Street
Salt Lake City, Utah 84138-1180

May 5, 1987

Honorable Orrin Hatch
United States Senator
3438 Federal Building
Salt Lake City, Utah 84138

Dear Senator Hatch:

This is in reference to your April 2, 1987, letter and concerns whether stockholders of the Ute Distribution Corporation are exempted from payment of United States income tax.

We have reviewed our February 10, 1983, memorandum to the Superintendent, Uintah and Ouray Agency, and March 3, 1983 memorandum from the Office of the District Counsel, Western Region, Internal Revenue Service to the District Director, Salt Lake City, Internal Revenue Service, (D.C. memo) copies of which came with your April 2, 1987, letter. Although our memorandum preceded the D.C. memo by about three weeks, it does not appear that the District Counsel for I.R.S. had access to it. While we agree with some things the District Counsel said in his memorandum, his conclusion that mixed-blood Ute Indians as a protected class must pay federal income tax on monies received by virtue of stock held by them in the Ute Distribution Corporation is clearly erroneous. The D.C. memo., page 6, recognized that full-blood mem-

bers of the Ute Tribe (Tribe) are "exempt from income tax." In this treatise our concern will rest exclusively with persons who are members of the mixed-blood protected class, more particularly these are those stockholders of the Ute Distribution Corporation (1) whose names are listed on the mixed-blood final roll, or (2) who are heirs or legatees of such a named person. Stockholders who are members of the mixed-blood protected class are exempt from payment of federal or state income tax as regards monies received by virtue of being a stockholder in the Ute Distribution Corporation (U.D.C.). We are informed that these persons comprise a relatively small group.

HISTORICAL AND LEGAL BACKDROP

Section 17 of the Ute Partition and Termination Act recites that, "[n]o distribution of the assets made under the provisions of this act shall be subject to any Federal or State income tax . . ." Act of August 27, 1954, Pub. L. 83-671, 68 Stat. 868, as amended, 70 Stat. 936 and 76 Stat. 597, 25 U.S.C. §§ 677-677aa, hereinafter referred to as the Act. Section 17 is codified at 25 U.S.C. § 677p. Further references herein will be to sections in the Act and to its codification.

The rule that no distribution of the assets is subject to federal or state income tax, read in context, is only modified conceptually to the effect that when UDC stock is held by a person who is not a member of the mixed-blood protected class nor a member of the tribe, then he or she may or may not be responsible for the payment of federal or state income tax.

In 1954, Senator Watkins was instrumental in Congress to terminate various Indian tribes. The result of the Ute Partitition and Termination Act was that a member of the Tribe who was terminated received individually a fee patent to such property as was theretofore held by the United States in trust for such individual

and the federal trust relationship to such individual was terminated. Section 23, 25 U.S.C. 677v. "Termination", as used in the Act is a word or art and refers to termination of the trust relationship to lands which were formerly held in trust by the United States for Indians and which were distributed by fee patent; also as an ending of some Indian status. *In this Act, termination was not total*, as we shall explain further.

"Mixed-blood" members of the tribe were terminated. "Full-blood" members of the tribe remained as members of the tribe, unless in individual cases such full-blood voluntarily determined to be terminated and classed with the mixed-bloods. The full-bloods as individuals did not receive a distributive share of those reservation assets which were distributed. The mixed-bloods as individuals did receive a distributive share of such reservation assets as were susceptible to being distributed.

The process of termination consisted of:

> [T]he partition and distribution of the assets of the Ute Indian Tribe of the Uintah and Ouray Reservation in Utah between the mixed-blood and full-blood members thereof [and] the termination of federal supervision over the trust, and restricted property, of the mixed-blood members of said tribe . . .

Section 1, 25 U.S.C. § 677.

Tribal "assets" were divided between two groups in proportion to the final membership roles of each group. The mixed-blood portion was then distributed in such a manner that individual mixed-bloods would have full control of their property.

"Asset" was defined to mean:

> [A]ny property of the tribe, real, personal or mixed, whether held by the tribe or by the United States in trust for the tribe, or subject to a restriction against alienation imposed by the United States.

Section 2(f), 25 U.S.C. § 677i(f).

Individual mixed bloods received fee patents to their allotted lands. Prior thereto, such allotments were held in trust by the United States for individual Indians, called allottees, and their heirs in accordance with Section 5 of the General Allotment Act of Feburary 8, 1887, 25 U.S.C. § 348. As to such lands the "Federal supervision of such member and his property" was terminated. Section 16(a), 25 U.S.C. § 677o(a). Shortly thereafter this distributed property became subject to property taxes and income derived therefrom became subject to federal and state income taxes.

> After seven years from August 27, 1954, all property distributed to the mixed-blood members of the tribe under the provisions of this subchapter, and all income derived therefrom by the individual . . . shall be subject to the same taxes, State and Federal, as in the case of non-Indians . . .

Section 17, 25 U.S.C. § 677p.

There were some properties included within the definition of tribal assets that where divided between the full-blood and mixed-blood groups but no distribution was made to individual mixed-blood Indians. The mixed-bloods, acting as Affiliated Ute Citizens of Utah, organized with a constitution pursuant to Section 6 of the Act (25 U.S.C. § 677e), organized three corporations under state law: (1) Antelope Sheep Range Company, incorporated October 15, 1958; (2) Rock Creek Cattle Range Company, incorporated October 15, 1958; and (3) Ute Distribution Corporation, incorporated December 9, 1958. Sizable amounts of tribal land, being in that portion as was divided to the mixed-blood group, were fee patented to the Antelope Sheep Range Company and Rock Creek Cattle Range Company. Each individual mixed-blood received one share of stock in each range corporation. This property was "exempt from property

taxes for a period of seven years from August 27, 1954," but

> After seven years from August 27, 1954, all property distributed to the mixed-blood members of the tribe under the provisions of this subchapter, and all income derived therefrom by the individual, *corporation* or other legal entity, shall be subject to the same taxes, State and Federal as in the case of non-Indians . . .

Section 17, 25 U.S.C. § 677p, emphasis added.

Each of these quotations are from Section 17, 25 U.S.C. § 677p. We, therefore, see the intent of Congress that in addition to individual mixed-bloods paying *after August 27, 1961*, property taxes on recently received fee patented lands that were formerly allotted lands, the two range companies would also be obligated to pay property taxes after August 27, 1961, and any income derived from such private lands or range company lands would be subject to any applicable state and federal income tax. The tribe in fact purchased nearly all of the stock of the two range companies. The two corporations were disincorporated under Utah law and most of the real property was conveyed to the United States of America in trust for the Ute Indian Tribe. The former range corporations are not the subject matter of our present inquiry, and the property that has been returned to trust status is no longer subject to any type of tax. This history is important to an understanding of why Section 17 was written the way it was.

Some tribal assets could not be divided as between the two groups for the reasons that no one knew the full definition of what the assets were and no one knew the the quantums or amounts of such assets. The division of assets, therefore, that occurred was only as to such "assets of the tribe that [were] then susceptible to equitable and practicable distribution." Section 10, 25 U.S.C. § 677i. The Plan for Division, approved October 9, 1956,

by the Superintendent, Bureau of Indian Affairs, provided for a division as between the two groups of all tribal assets susceptible to division. These included cash, whether on deposit in the United States Treasury to the credit of the tribe, or local funds to the credit of the tribe; loans receivable and credit program assets; accounts receivable; equipment; materials and supplies; buildings; tribal enterprises; and lands. Section 10 of the Act provided that

> All unadjudicated or unliquidated claims against the United States, all gas, oil, and mineral rights of every kind, and all other assets not susceptible to equitable and practicable distribution shall be managed jointly by the Tribal Business Committee and the authorized representatives of the mixed-blood group, subject to such supervision by the Secretary as is otherwise required by law, and the net proceeds therefrom after deducting the costs chargeable to such management shall first be divided between the full-blood and mixed-blood groups in direct proportion to the number of persons comprising the final membership role of each group . . .

Section 10, 25 U.S.C. § 677i. The referenced "unadjudicated or unliquidated claims against the United States" subsequently were fully adjudicated and divided as between the two groups. Those funds divided to the mixed-blood group were all distributed years ago.

All gas, oil, and mineral rights of every kind were held in trust by the United States for the Tribe prior to the 1954 Act and are presently held in trust by the United States for the Tribe.

> There is, and can be no dispute that the United States holds title to the land, including the mineral interest, constituting the Uintah and Ouray Reservation. Prior to the 1954 Act, all members of the tribe were the beneficial owners of that mineral interest.

* * *

> Althouh the *interest in the mineral estate* that AUC seeks to have conveyed pro rata to the individual mixed-bloods perhaps could be made the subject to an allotment, it has never been so subjected. Neither is it appurtenant to an allotment. The interest relates to the tribal land of the reservation. It *remains tribal property*. Further, § 10 of the 1954 Act, 25 U.S.C. § 677i, itself contemplates and provides specifically for the non-allocation of that interest.

Affiliated Ute Citizens v. United States, 406 U.S. 128, 31 L. Ed. 2d 741, 754-755 (1972), emphasis added. The *Affiliated Ute Citizen* case concerned the mixed-bloods terminated under the Act and their property rights.

The fact that the Act provided for a division of assets that were susceptible to division and distribution, and which resulted in certain properties being conveyed to individual mixed-bloods in fee, or to the two mixed-blood range companies in fee, and after August 27, 1961, being subject to such taxation as would otherwise be required by law upon such property and income derived therefore, as would otherwise be imposed upon persons who were non-Indians, while at the same time those nondivisible assets retained their trust status and are not subject to taxes is precisely the point that is misunderstood by the District Counsel to the I.R.S. The District Counsel states:

> We believe that there is no basis for *distinguishing distributable and nondistributable assets* of property for the purposes of this exemption and that it was the intent of Congress in terminating federal supervision over the *mixed-blood trust assets* to treat the mixed-bloods as non-Indians.

D.C. Memo, page 6, first paragraph, emphasis added. However, the Supreme Court ruled:

> The termination proclamation, contemplated by § 23 of the Act, 25 U.S.C. § 677v, was issued and pub-

> lished by the Secretary effective at midnight August 27, 1961. 26 Fed. Reg. 8042. *This, of course, did not purport to terminate the trust status of the undivided assets.* [Cit. Om.]

Affiliated Ute Citizen, 31 L. Ed. 2d 741 at 753. The oil, gas and mineral rights produce the income that is the subject matter of this dispute. They are *not "mixed-blood trust assets"* as referred to in the D.C. memo. Rather they remain tribal property and are held in trust for the Tribe. *Affiliated Ute Citizens*, 31 L. Ed. 2d 741 at 754-755. *The mixed-bloods have not lost their status as tribal members as concerns those assets not susceptible to equitable and practicable distribution.*

There has been a considerable amount of litigation as concerns those persons terminated by the Ute Partition and Termination Act both as to their current status and interest in remaining tribal assets. Each of these cases are cite specific. They deal with the Ute Tribe and those mixed-bloods terminated from the Tribe. It is not my desire to be repetitive, however, these various cases do throw light on the taxability of nondivided, nondistributed property.

In 1980, we prosecuted a mixed-blood terminated by the Ute Partition and Termination Act for fishing in Bottle Hollow Reservoir before the Federal Magistrate. The reservoir is within the reservation and is held in trust for the Ute Indian Tribe. The United States brought the action against such mixed-blood (Oranna Bumgarner Felter) on the theory that *she had lost* her status as an Indian by virtue of the termination proclamation issued by the Secretary of Interior in August, 1961, thereby losing her right to hunt and fish on reservation lands. The Federal District Court for the District of Utah and the Tenth Circuit Court of Appeals both got into the act. The rule from this case is that the mixed-blood members were terminated only as regards

such property as was distributed to them. They were not terminated as regards such property as was not distributed to them.

> Federal supervision of mixed-blood members and their property was terminated, "except as to [their] remaining interest in . . . tribal assets not susceptible to equitable and practicable distribution." [25 U.S.C. § 677i], § 677o(a).

United States v. Felter, 752 F.2d 1505 (1985) at 1507. In substantiation of this the court quoted from Section 5 of the Act showing that after publication of the final rules of full-bloods and mixed-bloods, "the tribe shall thereafter consist exclusively of full-blood members. Mixed-blood members shall have no interest therein *except as otherwise provided* in this subchapter." *Id.* (emphasis added) The court held that the Act did otherwise provide for a continued interest in assets not susceptible to equitable and practicable distribution.

Of all the termination legislation of the 1950's, the Ute Partition and Termination Act is the only act that created a group of mixed-bloods, leaving with them an interest in tribal assets. It is clear that the District Counsel for the I.R.S. does not understand the nature of termination and the nature of termination under the Ute Partition and Termination Act in particular. This is a one-of-a-kind act.

> It is important to note that "termination" does not mean that someone's identity as an Indian is ended. Cf. *United States v. Heath*, 509 F.2d 16 (9th Cir. 1974). Rather, what is terminated is (1) eligibility for federal services made available to those recognized as "Indian," and (2) the duties and powers invested in the United States regarding the management of their affairs, or their property.

United States v. Felter, 546 F. Supp. 1002 (1982) at 1004. The Federal District Court continued the thought in a footnote.

> 3. Nor is "termination" necessarily the end of tribal existence . . . Even when Congress has enacted legislation calling for the dissolution of specific tribes, something not done by the termination acts, the continued existence of the tribes in spite of the legislation has led to a continuation of the federal tribal relationship . . . If tribal existence is to end, it is for the Indians to end it.

Id. at Note 3.

The District Court explained that:

> Termination, therefore, does not equate . . . with the uncompensated extinguishing of vested rights in property protected by the Untied States Constitution.
>
> . . .
>
> [T]he language of the Ute Termination Act must be construed [in such manner that] any reading of its terms is governed "by that" eminently sound and vital cannon" . . . that "statutes passed for the benefit of dependent Indian tribes . . . are to be liberally construed, doubtful expressions being resolved in favor of the Indians." . . . In this context, courts are extremely reluctant to find abrogation of vested Indian rights by Congress absent explicit statutory language.

Id., at 1005, citations omitted.

The Circuit Court of Appeals ruled:

> We believe the preferable course is to refuse to impute to Congress an intent to abrogate the right of the mixed-blood Ute Indians to hunt and fish on reservation land and instead hold that the right to hunt and fish on the reservation is an "asset [] not

> susceptible to equitable and practicable distribution" under § 677i.

United States v. Felter, 752 F.2d 1505, 1512. The point is that this mixed-blood group consists of persons who are still Indians and have tribal rights as concerning non-distributable assets that were not taken from them by the Act.

> *The mixed-bloods retained interests in common with the tribal membership in oil, gas, and mineral resources of every kind,* all unadjudicated or unliquidated claims against the United States, "and all other assets not susceptible to equitable and practicable distribution". 25 U.S.C. § 677i.

United States v. Felter, 546 F. Supp. 1002 at 1023, emphasis added.

> [T]he Ute Termination Act . . . *preserved individual rights to share in tribal property* while otherwise altering or terminating the individual's relationship with the tribe . . . *It contrasts sharply with other legislation that expressly provided with complete severance* of tribal relations to an individual . . . While Congress may have the power to wholly partition the tribal estate . . . it must express its intent to do so in plain and unambiguous terms.

Id. at 1026, citations omitted, emphasis added.

ANALYSIS OF SECTION 17, U.S.C. § 677p.

With the foregoing as a backdrop, Section 17, 25 U.S.C. § 677p, is more readily understandable. It appears that the District Counsel of the I.R.S. did not have this background and that is understandable. This is the only section in the Act expressly dealing with taxation and he misread it. We think it impossible to understand this section absent an understanding of the foregoing principles. The Congressional intent is clear. The legisla-

tive history is supportive of the observations made heretofore and hereafter.

The first point to understand is the relationship of Section 17 to the Act. Section 16 provides (1) that the Secretary of the Interior will transfer "unrestricted control" of all property held in trust for each mixed-blood to such mixed-blood person; and (2) that

> *Federal supervision of such member and his property shall thereby be terminated, except as to his remaining interest in tribal property in the form of* any unadjudicated or unliquidated claims against the United States, all gas, oil, and mineral rights of every kind, and all other *assets not susceptible to equitable and practicable distribution,* all of which remain subject to the terms of this subchapter, notwithstanding anything contained herein to the contrary.

25 U.S.C. § 677o(a), emphasis added. The *distribution* of all "assets susceptible to equitable and practicable distribution" *was to be achieved within seven years* from August 27, 1954 (Section 14, 25 U.S.C. § 677m) which would be by August 27, 1961. With this time frame in mind, Congress proposed a tax exemption for all real property distributed for such seven-year period.

> The bill provides for a 7-year *exemption from property taxes,* on property distributed to members of the mixed-blood group, if the title remains in the distribute.

House Report No. 2493, dated July 26, 1954, U.S. Code Cong. and Admin. News, 1954, page 3355, emphasis added. This is the only legislative history on Section 17. Section 17 dictated three results, (1) an exemption of assets distributed under the Act from income taxes (federal and state) forever; (2) an exemption from property taxes of property distributed by fee patents for seven years from August 27, 1954; and (3) a declaration

that interest earned on cash treasury deposits and fee patented land will be subject to income taxation.

We will now review Section 17, sentence by sentence. *The first sentence says:*

> No distribution of the assets made under the provisions of this subchapter shall be subject to any federal or state income tax: Provided, That so much of any cash distribution made under this subchapter as consists of a share of any interest earned on funds deposited in the Treasury of the United States shall not by virtue of this subchapter be exempt from individual income tax in the hands of the recipients for the year in which paid.

"Distribution" is a word of art as used in this Act and has express reference to

(1) the mixed-blood portion of "all funds or other property derived from" sales, exchanges, or other dispositions of about 27,000 acres of tribal land referenced in Section 9, 25 U.S.C. § 677h, which were then distributed to individual mixed-blood members pursuant "to the terms of this subchapter." *Id.;*

(2) the mixed-blood portion of the "division of the assets of the tribe that [were] then susceptible to equitable and practicable distribution" which were distributed to individual members of the mixed-blood group pursuant to Section 10, 25 U.S.C. § 677i;

(3) the mixed-blood portion of net proceeds from"[a]ll unadjudicated or unliquidated claims against the United States, all gas, oil, and mineral rights of every kind, and all other assets not susceptible to equitable and practicable distribution" distributed to members of the mixed-blood group, *Id.;*

(4) the mixed-blood portion of all tribal cash assets referenced in Section 13, 25 U.S.C. § 6771(l);

(5) the mixed-blood portion of the partition of tribal lands, "excepting all gas, oil, and mineral rights, to corporations, partnerships, or other legal entities, and to trustees . . . so as to embrace . . . any improvements lawfully made by the person or persons receiving such land" *Id.*, at subparagraph 2;

(6) the receipt by the mixed-blood group of lands to be conveyed to corporations organized by the mixed-bloods "for the grazing of livestock, handling of water and water rights" *Id.* at subparagraph 3;

(7) the mixed-blood portion of tribal assets as transferred to "one or more trustees . . . for management or liquidation purposes", *Id.* at subparagraph 4; and

(8) the mixed-blood portion of the sale "of the assets of said group . . . and the proceeds of such sales shall be distributed equitably among the members of said mixed-blood group; after deducting reasonable costs of the sale and distribution." *Id.* at subparagraph 5.

The distribution of all or any of these assets is not "subject to any federal or state income tax" *unless* there is a clear and unequivocal statement in the Act modifying that rule. Such modification in fact occurs in this first sentence as regards "*interest earned* on funds deposited in the Treasury of the United States." *Id.*, emphasis added. The *taxation of income from invested income* is generally harmonious with the 1935 rule of the Supreme Court in *Superintendent of Five Civilized Tribes v. Commissioner of Internal Revenue*, 295 U.S. 418.

The term "assets" as defined in the Act, (see page four above) is broad enough to include the mixed-blood portion of the *net proceeds* from:

> All unadjudicated or unliquidated claims against the United States, all gas, oil, and mineral rights of every kind, and all other assets not susceptible to equitable and practicable distribution . . . managed

> jointly by the Tribal Business Committee and the authorized representatives of the mixed-blood group [i.e., UDC].

Section 10, 25 U.S.C. § 677i. Such net proceeds, therefore as are distributed through UDC to members of the mixed-blood protected group are not subject to federal or state income tax. If the contrary is true, there must be a clear and unequivical express provision in the Act so providing. There is in fact no such provision.

The second sentence reads:

> *Property distributed* to the mixed-blood group pursuant to the terms of this subchapter *shall be exempt from property taxes* for a period of seven years from August 27, 1954, unless the original distributee parts with title thereto, either by deed, descent, succession, foreclosure or mortgage, sheriff's sale or other conveyance: provided, that the mortgaging, hypothecation, granting of a right-of-way, or other similar encumbrance of said property shall not be construed as a conveyance subjecting said property to taxation under the provisions of this section.

Emphasis, added.

Generally, the word property in this Act is used as a synonym for the word asset. However, in this sentence specific reference is made to being "exempt from property taxes" which narrows the definition for the purpose of this sentence so that it could only include real or personal property which is in fact subject to property taxes. As self-defined and limited in this sentence, the word property clearly excludes cash asset distributions and net proceeds (cash) from assets not distributed. The net proceeds distributed through the UDC to members of the mixed-blood are clearly not contemplated by this sentence.

Personal property that may have been distributed to the mixed-blood group, the benefits of which eventually

reached individual mixed-bloods, was turned into cash prior to distribution to individual mixed-bloods. It is clear, therefore, that *this second sentence refers only to a distribution of real property* to which title is received by individual mixed-bloods or by a legal entity on their behalf such as the Antelope Sheep Range Company or Rock Creek Cattle Range Company. This second sentence means that the range corporation lands were to be free from state taxation for a period of seven years from August 27, 1954, as also the allotments fee patented to individual mixed-blood members.

It is important to note that *gas, oil, and mineral rights are not included in* either the *Plan for Division* or the *Plan for Distribution* referenced in Section 13, 25 U.S.C. § 677l.

The sentence refers to "mortgaging, hypothecation, granting of a right-of-way, or other similar encumbrance or said property" and states that if either of these events occur, the property will not be subject to txation during the aforesaid seven-year period. These terms, as used herein, seem to be referring to real property only. While "cash" is included within the term "tribal assets" it does not appear to be included within the use of the term "property distributed to the mixed-blood group" as used in this section sentence. Nor is there a hint that the second sentence has any reference to net proceeds derived from nondistributable assets distributed through UDC to mixed-blood members.

The third sentence reads:

> After seven years from August 27, 1954, all property distributed to the mixed-blood members of the tribe under the provisions of this subchapter, and all income derived therefrom by the individual, corporation, or other legal entity, shall be subject to the same taxes, state and federal, as in the case of non-Indians; except that any corporation organized by the mixed-blood members for the purpose of aiding

> in the joint management with the tribe and in the distribution of unadjudicated or unliquidated claims against the United States, all gas, oil, and mineral rights of every kind, and all other assets not susceptible to equitable and practicable distribution shall not be subject to corporate income taxes.

"Property" is not defined in the Act except as is discerned by the usage therein. While the second sentence refers to real property distributed being exempt from property taxes for a period of *seven years from August 27, 1954*, the third sentence concentrates on real property taxes *after August 27, 1961*. The third sentence, read in context, must have the same definition for "property distributed" as the identical phrase is used in the second sentence. As used in the second sentence, there can be little doubt but that reference is to real property distributed. Neither the Plan for Division for tribal assets as between the full-blood and mixed-blood groups, approved October 9, 1956, nor the Plan for Distribution to individuals of the mixed-blood group provided for a division or distribution of the assets not susceptible to equitable and practicable distribution, concerning which the I.R.S. now desires to apply general income tax laws. (We are unable to read the approval date on our copy of the Plan for Distribution.) The Plan for Distribution, in Article VII, refers to Section 10 of the Act, 25 U.S.C. § 677i, and recognizes that assets not susceptible to equitable and practicable distribution will not be so distributed. Article VII then proposes:

> [T]hat a corporation be formed under the laws of the State of Utah to receive all income belonging to the mixed-blood group from the theretofore unadjudicated or unliquidated claims against the United States, all income from oil, gas and mineral rights of every kind and from all other assets not susceptible to equitable or practicable distribution. *This corporation shall be organized not for purposes of profit, but shall be incorporated with a view of complying*

> *with the tax exemption provisions of state and federal law* with the major purpose of distributing to its stockholders the net revenues from such sources. . . . The stock of the corporation will be subject to transfer, devise, or dissent. Offices of the corporation will be delegated authority from the stockholders for participation in the joint management of such assets from which the corporate income is derived. . . . The powers of the corporation shall be limited to distribution of said assets and the power necessarily incident thereto.

Emphasis added.

Pursuant thereto the Ute Distribution Corporation was organized, as aforesaid. It is clear from this third sentence that *all income derived from the distributed real property to the sheep and cattle range companies* would be subject to the same taxes, state and federal, as in the case of non-Indians after August 27, 1961. These corporations no longer exist so this is not a problem herein. There is *no "property distributed" to the Ute Distribution Corporation.* It can now only receive net proceeds from "assets not susceptible to equitable and practicable distribution" (Section 13, 25 U.S.C. § 677i), i.e. *non-distributable assets* which remain in trust for full-blood and mixed-blood members.

The fourth and remaining sentence reads:

> Any valuation for purposes of Federal income tax on gains or losses shall take as the basis of the particular taxpayer the value of the *property on the date title is transferred* by the United States pursuant to this subchapter.

Emphasis added. This deals, clearly, only with real property transferred and income therefrom.

Sentences two, three and four read in context cover property taxes on real property distributed and income

derived therefrom. *Neither of these sentences refer to non-distributed real property remaining in trust for the both the full-blood and mixed-blood groups.*

COMPETENT AND NONCOMPETENT INDIANS

The I.R.S. District Counsel refers in his memorandum to "a certificate of competency." D.C. memo page 6. A little background on competent and noncompetent Indians at this point will be helpful. The word "competent" as applied to Indians probably stems from Section 6 of the General Allotment Act which authorized the Secretary of the Interior, in his discretion, to issue a patent in fee simple for the lands theretofore allotted to such Indian "whenever he shall be satisfied that any Indian allottee is competent . . ." Act of February 8, 1887, 24 Stat. 390, 25 U.S.C. § 349. The word has become a word of art.

> A noncompetent Indian is one who holds allotted lands only under a trust patent and may not dispose of his property without the approval of the Secretary of the Interior. It does not denote mental capacity.

Stevens v. C.I.R. 452 F.2d 741, 742 note 1 (9th CCA 1971) The thought under Section 6 of the General Allotment Act is that when an "Indian allottee is competent and capable of managing his or her affairs" as regards certain land the Secretary is authorized to issue to such person a patent in fee simple which has the effect of removing "all restrictions as to sale, incumbrance, or taxation of said land . . ." 25 U.S.C. § 349.

Certificates of competency have restricted usage. They are *not* given to a noncompetent Indian holding an allotment under the General Allotment Act, rather the term is used in connection with Indian individuals who hold land by virtue of a fee patent subject to restrictions on alienation. There are no restricted fee patents on the Uintah and Ouray Reservation, hence *no certificates of competency* have been issued there.

The procedures and regulations as pertaining to the obtaining of a certificate of competency are contained in 25 C.F.R. Part 152. The regulations pertaining to application for and the granting of a certificate of competency recite:

> Any Indian 21 years old or over . . . who holds land or an interest therein under a restricted fee patent may apply for a certificate of competency . . .

25 C.F.R. § 152.7.

> An application may be approved and a certificate of competency issued if the Secretary, in his discretion, determines that the application is competent. The delivery of the certificate shall have the effect of *removing the restrictions from land described therein.*

25 C.F.R. § 152.8(a), emphasis added. A certificate of competency applies *only* to the specific land described in the certificate. It would be possible, therefore, to have a certificate of competency as regards some land and not a certificate of competency as regards other land. The D.C. memo, page 6, suggests that "the trust relationship between the mixed-bloods and the United States in 1961 was essentially the same as issuing them a certificate of competency." They are not the same, but there are interesting similarities. As it is possible for an Indian to hold a certificate of competency as to some land and yet remain a non-competent Indian as to other lands, so it is that a mixed-blood who received a fee patent to his allotted land under the Ute Termination Act would still be considered a non-competent Indian for those assets not susceptible to equitable and practicable distribution concerning which he received no fee patent. This principle was recognized in the dicta of *Choteau v. Burnet*, 283 U.S. 691, 695-696 (1931), an old case, but the principle is quoted with approval by the United States Tax Court in 1977.

In *Choteau*, the Supreme Court stated (283 U.S. at 695-696):

> The Petitioner, then, was competent to hold and make any use (except to grant mining leases) of all his lands. All except his homestead were taxable, and were freely alienable without control or supervision of the government. . . . [A]s respects his property other than his homestead his status is not different from that of any citizen of the United States. . . . [A]s to homestead he still remains a restricted Indian.

Estate of Shelton v. Commissioner, 68 T.C. 15, 23 (1977). The D.C. memo opines, on page 6, that the rationale of *Choteau v. Burnet*, 283 U.S. 691 (1931) would support his thesis that mixed-blood members should pay income tax on the distribution of net proceeds of nondistributable assets. To the contrary, *Choteau* supports the conclusion expressed herein that such distribution to U.D.C. for mixed-bloods is in fact exempt from any tax. The express holding of *Choteau* was, in fact, limited by the Supreme Court in *Squire v. Capoeman.*

> The government also relies upon on *Choteau v. Burnet*, 283 U.S. 691, 75 L. Ed. 1353, 51 U.S. 598, but that case also is not controlling, since it held only that a competent Indian, who had unrestricted control over lands and income therefrom, was not exempt from income tax solely because of his status as an Indian. Such a tax [namely, *a tax on the reinvestment from income from allotted lands*] is specifically authorized by Section 6 of the General Allotment Act.

Squire v. Capoeman, 351 U.S. 1, 10, note 19 (1956), emphasis added. *Capoeman* deals with *income from income* from allotted lands.

RULE FOR STATUTORY INTERPRETATION FOR TAX EXEMPTION AS REGARDS INDIANS

The I.R.S. memorandum cites *Squire v. Capoeman*, *supra*, for the rule that Indians as citizens of the United States, "in ordinary affairs of life not governed by treaties" or statutes, "are subject to the payment of income taxes as are other citizens," and that an exemption to the general tax laws "should be clearly-expressed" in statutes or agreements with tribes as the statutory rule for interpreting whether a tax exemption would or would not be allowed in a specific case. *See Squire v. Capoeman*, 351 U.S. 1, 6 (1956). The D.C. memo then cites an old (1954) revenue ruling (Rev. Rul. 54-456) based upon three old cases: *Superintendent of Five Civilized Tribes v. Commissioner*, 295 U.S. 418 (1935); *Choteau v. Burnet*, 283 U.S. 691 (1931); and *Taunah et al. v. Jones*, 186 F.2d 445 (1951). The ruling in *Jones v. Taunah* (a 1951 Tenth Circuit Court of Appeals case) was overruled by the United States Supreme Court in *Squire v. Capoeman*, 352 U.S. 1, 5 (1956) and the ruling in *Choteau* was limited. *Id.* at 10, Footnote 19. In fact the holding of not one of these three cases supports the proposition for which they are quoted, although there is supporting *dicta* therein. Rev. Rul. 54-456 is *not* a complete statement of I.R.S. policy today.

For the past 30 years, commencing at least with *Squire v. Capoeman*, 351 U.S. 1 (1956) there has been a marked shift by the courts favoring Indian peoples in taxation matters as well as in many ther areas. *Capoeman* was a tax case. Two rather recent circuit court cases lay down the rule (based upon *Capoeman*) presently used by the courts by way of interpretation of the tax statutes insofar as Indians are concerned.

> Before discussing the specific points raised, we shall consider general principles applicable to all points. The general rule is that the reach of income tax statutes is broad; that exemptions from taxation are

> matters of legislative grace and that the exemptions must be construed with restraint in light of the policy to tax income comprehensively [citations omitted].
>
> Courts have recognized that *treaties and statutes* relating to the right of non-competent Indians *should be liberally construed in favor of Indians* [citations omitted]. However, such principle comes into play only *if such statute or treaty contains language which can reasonably be construed to confer income exemptions.*

Holt v. C.I.R., 364 F.2d 38 (8th CCA 1966) at 40, emphasis added. By way of further explanation as to the phrase "language which can reasonably be construed to confer income exemptions," the court talked of a treaty or statute which would "*expressly or impliedly*" exempt such income from taxation. *Id.* at 42, emphasis added. The Ninth Circuit Court of Appeals in 1980 laid down the rules thusly,

> By its terms, the federal income tax applies to "every individual" and "all income from whatever source derived." I.R.C. § 1, 61. "*Indians are subject to payment of federal income taxes*, as are other citizens, *unless an exemption from taxation can be found in the language of a Treaty or Act of Congress*" [citation omitted].
>
> The rule that *ambiguous statutes and treaties are to be construed in favor of Indians applies to tax exemptions*, [citations omitted] but this rules "comes into play only *if such statute or treaty contains language which can reasonably be construed to confer income [tax] exemptions.*" [*citations omitted*] "The intent to exclude must be definitely expressed. . . ."

United States v. Anderson, 625 F.2d 910, 913 (9th CCA 1980), emphasis added. These rules are also used in the United States Tax Court.

> It is fundamental that Indians are citizens and are liable for the payment of Federal income taxes unless applicable treaties or remedial legislation provide an exemption. *Squire v. Capoeman*, 351 U.S. 1 (1956). *While the general rule requires tax exemptions to be clearly expressed, statutes affecting Indians are liberally construed, with all doubtful expressions resolved in their favor. Squire v. Capoeman, supra*; *Big Eagle v. United States*, 300 F.2d 765. (Ct. Cl. 1962).

Estate of Shelton v. Commissioner, 68 T.C. 15, 21 (1977), emphasis added.

We are not left wondering as to the status of the mixed-blood members of the Ute Indian Tribe terminated pursuant to the Ute Termination Act as regards those assets not susceptible to equitable and practicable distribution; the income from which assets is the express subject matter of the controversy at issue here. The plain meaning of *United States v. Felter*, 546 F. Supp. 1002 (DC Utah 1982) and the same case decided by the Tenth Circuit Court of Appeals, 752 F.2d 1505 (10th CCA 1985) is to the effect that *those persons terminated pursuant to the Ute Termination Act, identified as mixed-bloods in the Act, have retained the rights of tribal membership as regards those assets not susceptible to equitable and practicable distribution* as referenced in Section 10 therein, 25 U.S.C. § 677i. This point was completely overlooked by counsel for I.R.S. in his opinion.

OF WHOM DOES THE MIXED-BLOOD GROUP COMPRISE?

Originally, it is clear, the group called mixed-bloods consisted of those members of the Ute Tribe who had less countable Indian blood than did the full-bloods, and also those full-bloods who joined the mixed-blood group by choice. Section 2, 25 U.S.C. § 677a(b) and (c). The

purpose of the Ute Partition and Termination Act was to *divide* tribal assets that were subject to equitable and practicable distribution; then to *distribute* such tribal assets that were determined to be the mixed-blood portion to individual mixed-bloods; and finally to terminate Federal supervision of such member and his distributed property. Sections 1, 10, 13, 16 and 23, codified as 25 U.S.C. §§ 677, 677i, 677l, 677o and 677v.

In so far as division of assets was concerned it was "based upon the relative number of persons comprising the final membership roll of each group." Section 10, 25 U.S.C. § 677i. This formula was not altered when changes occurred in the number of full-bloods or mixed-bloods. The ratio for divided assets remained constant.

The assets that were not susceptible to equitable and practicable distribution were held "in common" by the full-blood and mixed-blood groups. *United States v. Felter*, 752 F.2d 1505, 1508 (10th CCA 1985). The ownership of these assets *are held in common today. Id.*

The mixed-bloods on the final roll each received 10 shares of stock in the Ute Distribution Corporation. If such member determined to *dispose of his stock prior to termination* he could do so but the disposal was *subject to the approval of the Secretary.* Section 15, 25 U.S.C. § 677n. After termination (August 26, 1961, 12 midnight) no such approval was necessary. *Affiliated Ute Citizens v. United States*, 406 U.S. 128, 31 L. Ed. 2d 741, 759 (1972). Originally, disposal could be by sale, inheritance or by will; or by adverse court action. However, the Act of September 25, 1962, P.L. 87-698, 76 Stat. 597 amended Section 10 of the Ute Partition and Termination Act.

> The stock of any corporation organized by the mixed-blood group for the purpose of empowering the officers of such corporation to act as the authorized rep-

> resentatives of said mixed-blood group in the joint management with the tribe [of undivided property] and in the distribution [of net proceeds from] unadjudicated or unliquidated claims against the United States, all gas, oil, and mineral rights of every kind, and all other assets not susceptible to equitable and practicable distribution shall not be subject to mortgage, pledge, hypothecation, levy, execution, attachment or other similar process, while such stock *remains in the ownership of the original stockholder or his heirs or legatees*, but the interest of stockholders in any distribution by such corporation shall be subject to the usual processes of the law.

25 U.S.C. § 677i, emphasis added. The group of mixed-bloods was thereby enlarged to include *heirs* and *legatees* who were stockholders of the Ute Distribution Corporation. Specifically the *protected class* is a *stockholder of U.D.C.* (1) who is on the original final roll, or (2) who is an *heir* or *legatee* of a mixed-blood listed on such roll. The codification editors observe that there is an obvious error in the wording. Our bracket inserts make this paragraph read harmoniously with the rest of the section and the legislative history.

> Section 10 of the Termination Act excepted from the division and *retained in common ownership all mineral rights* and all claims against the United States. The tribal business council continues to manage the undivided property of the fullbloods whereas the mixed-bloods organized the Ute Development Corp. to handle their assets and to distribute income from the *undivided tribal property still owned jointly by the full-bloods and mixed-bloods.*
>
> In order to insure that the mixed-bloods' corporation stock may not be lost by being offered as security for minor debts, S. 1924 provides that so long as the stock remains in the ownership of the original stock-

> holder or his heirs or legatees it will not be subject to mortgage, hypothecation,- execution, or similar process. It provides, however, that the income from the stock shall be subject to the usual process of law.
>
> The committee was assured that this legislation will not be in conflict with Utah statutory law and will not effect any transactions that may have taken place before its enactment.

Senate No. 2000, dated September 6, 1962, U.S. Code Cong. & Admin. News, 1962, P. 2656, emphasis added. While the *income* from the stock is subject to mortgage, pledge, hypothecation, levy, etc. (Section 10, 25 U.S.C. § 677i) it remains free from federal and state income tax while held by a member of the protected class. *Id.*, also section 17, 25 U.S.C. § 677p.

CONCLUSIONS

With these rules in mind, an understanding of the specific section dealing with tax exemption in the Ute Termination Act (Section 17, 25 U.S.C. § 677p) and the provisions contained therein become clear.

The conclusions, therefore, inescapably are:

1. An express exemption from federal and state income tax does exist in Section 17 of the Act. 25 U.S.C. § 677p.

2. Sentences 2, 3 and 4 of this tax exemption section refer to real property divided to the mixed-blood group and distributed to individual mixed-blood members thereof and income derived therefrom. The third sentence, relied on so heavily in the D.C. memo, specifically refers to all real property distributed to the mixed-blood members of the tribe under the provisions of the Act, and then states that income derived from such distributed property is subject to federal and state income taxes after August 27, 1961.

3. In the unlikely event that the Federal Court would rule that this sentence is ambiguous and could be construed, as counsel for the I.R.S. so states, to include income from nondivisable and nondistributed assets, then and in that event the rule that ambiguous statutes are to be construed in favor of Indians applies to this case. Our interpretation is at least reasonable, fair and equitable. We only need to show a reasonable interpretation of an express statute stating the exemption. We have done this. The D.C. memo falls short in its analysis and fails to grapple with these principles.

4. The protected class is a stockholder of the Ute Distribution Corporation (a) who is on the final roll for mixed-bloods, or (b) who is an heir or legatee of such listed mixed-blood. Again, the rule that ambiguous statutes are to be construed in favor of Indians applies, if there is any ambiguity.

Sincerely,

DAVID K. GRAYSON
Acting Regional Solicitor

By /s/ William Robert McConkie
WILLIAM ROBERT MCCONKIE
Attorney

cc: Superintendent, Uintah and Ouray Agency, Ft. Duchesne, Utah Ute Distribution Corporation, Roosevelt, Utah

APPENDIX E

UNITED STATES DEPARTMENT
OF THE INTERIOR

OFFICE OF THE SOLICITOR
Suite 6201, Federal Building
125 South State Street
Salt Lake City, Utah 84138

February 10, 1983

Memorandum

To: Superintendent, Uintah and Ouray Agency

From: Regional Solicitor, Intermountain Region

Subject: Payment of Income Tax by Stockholders on Proceeds of UDC Stock and Effect of Windfall Profit Tax

The following is a revision of our July 25, 1975 Memorandum to you in light of the Crude Oil Windfall Profit Tax Act of 1980, 94 Stat. 229, P.L. 96-223, 26 U.S.C. §§ 4986-4998.

The issues have been raised as to whether stockholders in the Ute Distribution Corporation must pay income taxes on money received as stockholders, in light of Section 17 of the Ute Partition and Termination Act of August 27, 1954, 25 U.S.C. §§ 667-677aa, § 677p, and whether windfall profit taxes must be paid.

You asked for our comments.

In 1954 Congress enacted the Ute Partition and Termination Act, which, had these goals:

(1) To partition all tribal assets that could practicably be partitioned between two divisions of the Ute Tribe, Uintah and Ouray Reservation, Utah, to-wit, the full-blood and mixed-blood groups;

(2) To distribute to individuals mixed-bloods those assets partitioned to them as a group and

(3) To terminate federal supervision over the mixed-blood trust assets.

25 U.S.C. § 677.

Section 10, 25 U.S.C. § 677i, provides that all unadjudicated or unliquidated claims against the United States, all gas, oil, and mineral rights of every kind, and all other assets not susceptible to equitable and practicable distribution would *not be divided* between the two groups; rather, they would be *managed jointly* by the representatives of both groups and *the net proceeds therefrom*, which clearly includes bonus monies, after deducting the costs chargeable to management, *would be divided between the full-blood and mixed-blood groups* in direct proportion to the number of persons comprising the final membership role of each group.

A Plan for Division of Assets was approved October 9, 1956. This plan made no provision for a division of those assets which were not susceptible to equitable and practicable distribution.

Section 13, 25 U.S.C. § 677e, provides that after the adoption of a plan for the division of the assets between the two groups, a plan for distribution of the assets of the mixed-blood group to the individual members thereof would be prepared. The Plan for Distribution, as supplemented, was approved November 2, 1956. Part VII thereof, entitled "Assets Not Susceptible to Equitable and Practicable Distribution," proposed that a corporation be formed under the laws of the State of Utah to receive all income belonging to the mixed-blood group from those assets not susceptible to equitable and practicable distribution. The Ute Distribution Corporation was organized thereafter by the mixed-bloods in accordance with authority granted in Section 6, 25 U.S.C. § 677e. The mixed-bloods each received ten shares of stock. The UDC was organized essentially as a funnel organization through which the "net proceeds" from 27.16186 per cent

of all unadjudicated or unliquidated claims against the United States, all gas, oil, and mineral rights of every kind, and all other assets not susceptible to equitable and practicable distribution would be distributed among the stockholders thereof. See *Affiliated Ute Citizens* v. *United States*, 406 U.S. 128, 31 L.Ed.2d 741, 92 S.Ct. 1456 for a rather complete recital of the history and authority of these events. We understand that more than one-half of all original shares are now owned by persons not listed as mixed-bloods upon the final roles.

FEDERAL AND STATE INCOME TAXES

With this background in view, we now examine Section 17, 25 U.S.C. 677p, entitled: "Tax Exemption; Exceptions and Time Limits; Valuation for Income Tax on Gains and Losses," sentence by sentence.

The first sentence says:

> *No distribution of the assets made under the provisions of Sections 677-677aa of this title shall be subject to any Federal or State income tax*: Provided, that so much of any cash distribution made under said sections as consists of a share of any interests earned on funds deposited in the Treasury of the United States shall not be virtue of said sections by exempt from individual income tax in the hands of the recipients for the year in which paid. (emphasis added)

"Asset" is defined in Section 2(f), 25 U.S.C. § 677a(f), to mean, all property of the tribe, real, personal or mixed. Cash reserves held by the tribe or by the United States for the tribe were included in the division and distribution of assets. The referenced treasury funds have long since been distributed, hence the proviso is not now applicable to UDC stockholders.

This first sentence directs that *monies received by UDC stockholders being a distribution of tribal assets are not*

subject to state or federal income tax. This specifically includes monies received from a lease of "gas, oil, and mineral rights of every kind" of tribal properties. This exemption is total, unless modified by another statement in the Act or expressly overruled by a subsequent Act of Congress.

The second sentence says:

> *Property distributed* to the mixed-blood group pursuant to the terms of said sections *shall be exempt from property taxes* for a period of seven years from August 27, 1954, unless the original distributee parts with title thereto, either by deed, descent, succession, foreclosure of mortgage, sheriff's sale or other conveyance: Provided, that the mortgaging hypothecation, granting of a right-of-way, or other similar encumbrance of said property shall not be construed as a conveyance subjecting said property to taxation under the provisions of this section. (emphasis added)

The word "property" is not defined, however, it obviously refers to real or personal property subject to state "property taxes". There are no federal property taxes. There is no property tax on income derived from stock. It is apparent that the second sentence has no reference to income from UDC stock.

The third sentence says:

> After seven years from August 27, 1954, *all property distributed to the mixed-blood members* of the tribe under the provisions of Sections 677-677aa of this title, and *all income derived therefrom* by the individual, corporation, or other legal entity, shall be subject to the same taxes, State and Federal, as in the case of non-Indians; except that *any corporation* organized by the mixed-blood members *for the purpose of aiding in the joint management* with the tribe and in the distribution of unadjudicated or unliquidated claims against the United States, all

> gas, oil and mineral rights of every kind, and all other assets not susceptible to equitable and practicable distribution *shall not be subject to corporate income taxes.* (emphasis added)

Obviously, "property" as used in this sentence has the same meaning as "property" as used in the second sentence. The "income" referenced is that which is "derived" from the tangible real or tangible personal property distributed to the mixed-bloods. We emphasize that the money distributed to UDC stockholders is derived from those *assets not susceptible to equitable and practicable distribution*, and which *were not divided* between the two groups and *were not distributed* to the mixed-bloods terminated by the Act. This sentence does not refer to income from UDC stock. That portion of the third sentence which follows the word "except that" was added by amendment, August 2, 1956, P. L. 84-920, 70 Stat. 936, and adds only that there will be no corporate income tax, because it is essentially a funnel organization.

The fourth and remaining sentence says:

> Any valuation for purposes of Federal income tax on gains or losses shall take as the basis of the particular taxpayer the value of the property on the date title is transferred by the United States pursuant to said section.

The sentence refers to real property, which having been previously divided and distributed is now given the date title is transferred for capital gains purposes. Money from UDC stock does not fit into this category.

It is obvious that the second, third, and fourth sentences of Section 17 have no reference to the funds received by stockholder from the UDC.

The exemption in Section 17, sentence one, is not modified by the Act.

WINDFALL PROFIT TAX

The Crude Oil Windfall Profit Tax of 1980, 94 Stat. 229, P.L. 96-223, 26 U.S.C. §§ 4986-4998, imposed for the first time a temporary excise tax upon taxable crude oil removed from the premises. 26 U.S.C. § 4986. See House Conference Report No. 96-817, P. 92; also U.S. Code Congressional and Administrative News, 96 Congress, 1980, p.645. No person is exempt from paying the tax unless the oil is exempted by the Act or a subsequent act. 26 U.S.C. § 4991(a), H. C. R. No. 96-817, P. 106.

Exempt oil includes *exempt Indian oil*, 26 U.S.C. § 4991 (b), which is, by definition, any domestic crude oil.

1. The producer of which is an Indian tribe, member of a tribe, or tribal organization, and which is produced from mineral interests which are held in trust by the United States, or are subject to a restriction on alienation,

2. The producer is a native corporation under the Alaska Native Claims Settlement Act, *or*

3. The proceeds from the sale of which are deposited in the Treasury of the United States to the credit of tribal or native trust funds.

26 U.S.C. § 4994(d).

The producer is the holder of the economic interest with respect to the crude oil, 26 U.S.C. § 4996, and is also "defined as the person who owns the economic interest in the oil." H.C.R. No. 96-817, P. 106.

Under the Ute Partition and Termination Act, *supra*, the Tribe retained its position as beneficial owner of all minerals held in trust by the United States, i.e., the beneficial owner before the Act was the Tribe and after termination is the Tribe, although the Tribe was reduced in number by the termination of its mixed-blood members. The mineral interest

> . . . remains tribal property. Further, § 10 of the 1954 Act, 25 U.S.C. § 677i, itself contemplates and provides specifically for the nonallocation of that interest.

Affiliated Ute Citizens of the Utah v. *United States*, 406 U.S. 128, 31 L.Ed.2d 741, 754-755, 92 S.Ct. 1456 (1972).

The terminated mixed-bloods, have no property interest and also no economic interest in trust minerals.

The Ute Tribe as beneficial interest owner has a property interest and as lessor has a royalty interest in production. The Tribe is a "producer" under the Windfall Profits Tax Act, and the oil and gas recovered from tribal minerals under lease are "exempt Indian oil" in an amount equal to the royalty obligation under the lease. 26 U.S.C. § 4994(d)(1). H. C. R. No. 96-817, P. 108.

The Ute Distribution Corporation receives, by virtue of 25 U.S.C. § 671i, its share of royalty revenues which are then funneled to stockholders. This, does not change the status of the royalty oil and gas as being exempt Indian oil.

Although the burden of the tax rests upon the producer, meaning in this instance the lessee or its approved assignee, the tax is in fact withheld at the time of first purchase by the first purchaser, 26 U.S.C. § 4995, and deposited with the Treasury. H. C. R. No. 96-817, P. 111. This withholding predates, or is simultaneous with, payment of royalty.

The monies recieved by the Tribe as it 72.83814% share of royalty are exempt under 26 U.S.C. § 4994(d)(1) and (3). The Ute Tribe has acquired a considerable amount of UDC stock. The monies received as a UDC stockholder receiving a portion of the mixed-bloods distributive share of 27.16186% of royalty are exempt because all royalty monies under these Indian leases are

derived from "exempt Indian oil" and are exempt under 26 U.S.C. § 4994(d)(1).

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No. 91-1399

In the Supreme Court of the United States

OCTOBER TERM, 1991

UTE DISTRIBUTION CORPORATION, ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether 25 U.S.C. 677p provides an exemption from the federal income tax for cash distributions made to Indian and non-Indian shareholders by the Ute Distribution Corporation in 1984.

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A13) is reported at 938 F.2d 1157. The opinion of the district court (Pet. App. A14-A28) is reported at 721 F. Supp. 1202.

JURISDICTION

The judgment of the court of appeals was entered on July 16, 1991. The petition for rehearing was denied on December 2, 1991 (Pet. App. A29-A30). The

petition for a writ of certiorari was filed on February 28, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 17 of the Ute Indian Supervision Termination Act of 1954, 25 U.S.C. 677p, provides as follows:

> **Tax exemption; exceptions and time limits; valuation for income tax on gains or losses**
>
> No distribution of the assets made under the provisions of this subchapter shall be subject to any Federal or State income tax: *Provided*, That so much of any cash distribution made [under this subchapter] as consists of a share of any interest earned on funds deposited in the Treasury of the United States shall not by virtue of this subchapter be exempt from individual income tax in the hands of the recipients for the year in which paid. Property distributed to the mixed-blood group pursuant to the terms of this subchapter shall be exempt from property taxes for a period of seven years from August 27, 1954, unless the original distributee parts with title thereto, either by deed, descent, succession, foreclosure of mortgage, sheriff's sale or other conveyance: *Provided*, That the mortgaging, hypothecation, granting of a right-of-way, or other similar encumbrance of said property shall not be construed as a conveyance subjecting said property to taxation under the provisions of this section. After seven years from August 27, 1954, all property distributed to the mixed-blood members of the tribe under the provisions of this subchapter, and all income derived therefrom by the individual, corporation, or other legal entity, shall be subject to the same taxes, State and Federal, as in the case of non-Indians; except

that any corporation organized by the mixed-blood members for the purpose of aiding in the joint management with the tribe and in the distribution of unadjudicated or unliquidated claims against the United States, all gas, oil, and mineral rights of every kind, and all other assets not susceptible to equitable and practicable distribution shall not be subject to corporate income taxes. Any valuation for purposes of Federal income tax on gains or losses shall take as the basis of the particular taxpayer the value of the property on the date title is transferred by the United States pursuant to this subchapter.

STATEMENT

1. Petitioner Ute Distribution Corporation (UDC) is a Utah corporation organized pursuant to the Ute Indian Supervision Termination Act of August 27, 1954 (commonly known as the Ute Partition Act), ch. 1009, 68 Stat. 868, 25 U.S.C. 677-677aa). The other petitioners are four stockholders of that corporation, who received distributions of cash from it in 1984, and two spouses of those stockholders.

The Ute Partition Act was one of a series of enactments during the 1950s and 1960s designed to terminate the federal government's special relationship with certain Indian tribes. See generally F. Cohen, *Handbook of Indian Law* 811-817 (1982). A significant impetus for that termination legislation came in 1949, when the Commission on the Organization of the Executive Branch of the Government (commonly known as "the Hoover Commission") issued a report to Congress on Indian affairs. See Commission on Organization of the Executive Branch of the Government, *Report to Congress* 53-81 (Mar.

1949). The Hoover Commission recommended that a "program for the Indian peoples must include progressive measures for their complete integration into the mass of the population as full, tax-paying citizens." *Id.* at 65.

In formulating a policy to implement these recommendations, House Concurrent Resolution 108 (H.R. Con. Res. 108, 83d Cong., 1st Sess. (1953) (67 Stat. B132) stated that:

> [I]t is the policy of Congress, as rapidly as possible, to make the Indians * * * subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States, to end their status as wards of the United States, and to grant them all of the rights and prerogatives pertaining to American citizenship; * * *.

The resolution designated certain tribes as candidates for immediate termination and directed the Secretary of the Interior to recommend legislation to Congress by January 1, 1954, that would accomplish the purposes of the resolution. H.R. Con. Res. 108, *supra.*

In 1954, Congress enacted six different termination Acts, including the Ute Partition Act.[1] These Acts

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[1] The other termination Acts were as follows: Act of June 17, 1954, ch. 303, 68 Stat. 250 (repealed 1973) formerly 25 U.S.C. 891-902 (1970)) (Menominee Tribe); Act of August 13, 1954, ch. 732, 68 Stat. 718 (25 U.S.C. 564-564w-2 (Klamath Tribe); Act of August 13, 1954, ch. 733, 68 Stat. 724 (25 U.S.C. 691-708) (60 tribes and bands in Western Oregon); Act of August 23, 1954, ch. 831, 68 Stat. 768 (25 U.S.C. 721-728 (Alabama and Coushatta Tribes of Texas); Act of September 1, 1954, ch. 1207, 68 Stat. 1099 (25 U.S.C. 741-760) (Southern Paiute Tribe).

generally provided for the termination of federal supervision over the pertinent tribe or band. In addition, all but one of the Acts contained a tax provision that specified how distributions of tribal property or assets and income relating thereto would be taxed.[2] The tax provisions in the termination Acts other than the Ute Partition Act generally stated that distributed tribal property would not be subject to tax at the time of distribution, but following distribution the property and income therefrom would be subject to tax.

The Ute Partition Act addressed a situation that was different from those addressed by the other termination Acts enacted in 1954. The mixed-blood members and the fullblood members of the Ute Indian tribe had different views about their readiness for termination. "[T]he majority of the mixed blood group fe[lt] that they [were] ready for a termination of Federal supervision over their property and the fullblood Indians believ[ed] that they [were] not ready for such action." H.R. Rep. No. 2493, 83d Cong., 2d Sess. 2 (1954); S. Rep. No. 1632, 83d Cong., 2d Sess. 5 (1954). Accordingly, Congress was faced with the problem of partitioning the tribal property between the terminated and non-terminated groups. The partition was accomplished by first preparing rolls of the full-blood members and the mixed-blood members. See 25 U.S.C. 677g. The divisible assets were then divided based upon the relative num-

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[2] See 25 U.S.C. 564j, 677p, 699, 749, and 898 (repealed 1973). The only termination Act that did not contain a tax provision (25 U.S.C. 721-728) essentially placed the State of Texas in the trust position that had previously been held by the United States and was fundamentally different from the other termination Acts. See H.R. Rep. No. 2491, 83d Cong., 2d Sess. (1954), *reprinted in* 1954 U.S. Code Cong. & Ad. News 3119.

ber of persons comprising the membership roll of each group; the nondivisible assets, which in large part consisted of subsurface oil, gas and other mineral rights (Pet. App. A3), were allocated "between the full-blood and mixed-blood groups in direct proportion to the number of persons comprising the final membership roll of each group and without regard to the number of persons comprising each group at the time of the division of the proceeds." 25 U.S.C. 677i.

Pursuant to the plan adopted in the Ute Partition Act, the mixed-bloods organized the Affiliated Ute Citizens (AUC) and empowered its board of directors to act as their authorized representative. The mixed-bloods approved a plan for a division of the tribal assets that was adopted by the Tribal Business Committee and the AUC. Under this plan, most of the divisible assets were directly transferred to the mixed-bloods. With respect to the nondivisible assets, however, the plan provided for the formation of a corporation that was jointly to manage the assets with the Tribal Business Committee, receive the income therefrom that represented the share of the mixed-blood group and distribute that income to its shareholders. Pet. App. A3.[3]

UDC was formed for these purposes in late 1958. Each mixed-blood listed on the rolls received ten shares of UDC stock. The stock was immediately transferable.[4] If a mixed-blood Ute sold his stock to

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[3] In 1956, Congress amended the Ute Partition Act to add an exception for corporate income taxes that would otherwise be imposed on that corporation with respect to the income it received on the nondivisible assets. Act of August 2, 1956, ch. 880, 70 Stat. 936.

[4] The only restriction placed on transfer was a right of first refusal given to the members of the Ute Indian Tribe until August 26, 1964. Pet. App. A4.

a non-Indian, the non-Indian purchaser was entitled to receive the distributions of income from UDC.[5] The termination of the mixed-blood members of the Ute Indian Tribe was completed when the Secretary of the Interior issued a proclamation effective August 27, 1961, declaring that "[a]ll statutes of the United States which affect Indians because of their status as Indians shall no longer be applicable [to the mixed-bloods]." 26 Fed. Reg. 8042 (1961).

2. During 1984, UDC made cash distributions of income earned on the nondivisible assets to its stockholders. The individual petitioners received their proportionate shares, but excluded the distributions from UDC from the income reported on their income tax returns for 1984. The IRS audited those returns, determined that the excluded income was taxable and assessed tax deficiencies against each of the individual petitioners. The individual petitioners thereafter paid the assessed amounts and filed timely claims for refund, which were disallowed. Petitioners then filed suit in federal district court.[6] Pet. App. A5.

In district court, petitioners contended that 25 U.S.C. 677p granted any UDC stockholder, whether Indian or non-Indian, a complete exemption from tax on any distributions of cash or property received from UDC. Petitioners also maintained that, in the event the court rejected their interpretation of the statute, its ruling should be applied prospectively only. The government contended that the plain language of

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[5] Petitioner Chris Denver is a non-Indian who purchased stock from a mixed-blood Ute. Pet. App. A4-A5 n.2.

[6] UDC sought refunds of penalties and interest for 1984 and 1985 and a declaratory judgment that it was not required to file 1099 information returns. Those claims are not at issue here.

the statute made all distributions from UDC to its shareholders after August 27, 1961, fully taxable. Pet. App. A22-A23.

The district court concluded that the government's interpretation was correct. The statute provides that "all property distributed [after an initial seven-year period ending August 27, 1961] and all income derived therefrom * * * shall be subject to the same taxes, State and Federal, as in the case of non-Indians." 25 U.S.C. 677p. The only exemption granted by the statute, for the period after August 27, 1961, was for corporate income taxes for the corporations (such as UDC) that were organized by the mixed-blood members to aid in the joint management and distribution of the nondivisible assets. *Ibid.* Since the tax at issue in this case was not assessed on the corporation, but on the individuals who received distributions from the corporation, the tax was not proscribed by the statute. Pet. App. A23-A24.

The court also noted (Pet. App. A25) that there was no basis in logic, nor policy in the statute, to justify a tax exemption (after August 27, 1961) for mixed bloods on distributions received from UDC. The district court nevertheless concluded, that "although today this court has ruled that UDC distributions are taxable, as a matter of fundamental fairness this ruling shall apply prospectively only. That is, the taxable status of UDC distributions as applied to individual shareholders shall commence with the tax year 1989" (*id.* at A26). The district court therefore concluded (*id.* at 27a-28a) that the distributions received by the individual petitioners in 1984 were not subject to tax.

3. All parties appealed the judgment of the district court. The court of appeals held (Pet. App. A6) that 28 U.S.C. 2201 precluded the district court from

exercising jurisdiction over claims seeking declaratory judgments relating to federal taxes. The court further held that the "district court properly concluded [that] UDC income distributions made after August 27, 1961 are subject to federal income tax" (Pet. App. A10). Finally, the court of appeals held (*id.* at A12-A13) that the district court erred in applying its decision only prospectively. The court therefore reversed the award of refunds to the individual petitioners (*ibid.*).

ARGUMENT

The court of appeals correctly held that the cash distributions received by the Indian and non-Indian shareholders of UDC in 1984 were subject to federal income tax because Section 17 of the Ute Partition Act, 25 U.S.C. 677p, does not exempt that income from tax. This decision does not conflict with any decision of this Court or of any other court of appeals. Further review is therefore not warranted.

1. Under the Internal Revenue Code, the income of every individual "from whatever source derived" is subject to the income tax. 26 U.S.C. 1, 61(a). Through this sweeping language, Congress intended to exert "the full measure of its taxing power." *HCSS-Laundry* v. *United States*, 450 U.S. 1, 5 (1981) (per curiam); *Commissioner* v. *Glenshaw Glass Co.*, 348 U.S. 426, 429 (1955); *Helvering* v. *Clifford*, 309 U.S. 331, 334 (1940). It is thus well settled that "every element of gross income of a person, corporat[ion], or individual, is subject to tax unless there is a statute or some rule of law that exempts that person or element." *HCSS-Laundry* v. *United States*, 450 U.S. at 5. Adhering to that basic principle, this Court has consistently held that "Indians are citizens and

that in the ordinary affairs of life, not governed by treaties or remedial legislation, they are subject to the payment of income taxes as are other citizens." *Squire* v. *Capoeman*, 351 U.S. 1, 6 (1956); accord, *Choteau* v. *Burnet*, 283 U.S. 691 (1931). The cash distributions that the UDC shareholders received in 1984 were thus unquestionably subject to federal income tax unless specifically exempted from the tax by statute or treaty.

Petitioners err in contending (Pet. 13-16) that 25 U.S.C. 677p exempts the income distributed by UDC in 1984 from income taxation. By its terms, Section 677p provides a tax exemption for UDC distributions for the limited period of time expiring on August 27, 1961. The statute begins by stating that "[n]o distribution of the assets * * * shall be subject to any Federal or State income tax." 25 U.S.C. 677p. That exemption, however, is limited by the subsequent clause, which states that "[a]fter seven years from August 27, 1954, *all property distributed* to the mixed-blood members of the tribe under the provisions of this subchapter, and *all income derived therefrom by the individual*, corporation, or other legal entity, shall be subject to the same taxes, State and Federal as in the case of non-Indians." *Ibid.* (emphasis added). By virtue of that subsequent clause, all property distributed by UDC *after* August 27, 1961, is not within the limited tax exemption created in the first sentence of the statute. Such distributions are therefore subject to the same federal tax applicable to taxpayers generally.

The cash distributions received by the petitioners in 1984 from UDC consist of amounts that UDC earned on the nondivisible assets it held. For non-Indian distributees, there is no doubt that the distri-

bution of earnings by a corporation to its shareholders is not tax exempt. See 26 U.S.C. 61; *HCSS-Laundry* v. *United States*, 450 U.S. at 5; *Commissioner* v. *Glenshaw Glass Co.*, 348 U.S. at 429. Since 25 U.S.C. 677p provides that all post-1961 distributions of property, as well as income derived therefrom, are to be subject to the same federal and state taxes "as in the case of non-Indians" (*ibid.*), it follows that the distributions of income received by the individual petitioners in 1984 from UDC are subject to the federal income tax.

Petitioners' attempt (Pet. 14-15) to avoid the clear mandate of Section 677p is based on a tortured and illogical construction of that provision. Petitioners maintain that the time-limitation clause in Section 677p should be read as if it said that "after 1961, the property distributed is subject to property tax, as is any income derived from that property such as capital gains from its sale or rental income" (Pet. 15). Thus, petitioners conclude that the time-limitation clause applies only to property taxes and that *all* distributions of property (including cash) made by UDC to its shareholders—regardless whether the distributions are made before or after August 27, 1961, and regardless whether such shareholders are Indians or non-Indians—are exempt from the federal income tax.

Petitioners' contention that the time-limitation clause in 25 U.S.C. 677p is limited to property taxes is simply wrong. The time-limitation clause expressly states that the taxes encompassed by it are the "same taxes, State and Federal, as in the case of Non-Indians." *Ibid.*[7] It does not state, as petitioners

[7] The petitioners maintain (Pet. 21-22) that the Ute Partition Act should be read *in pari materia* with the other termi-

would have it, that it applies solely to property taxes. In addition, petitioners' argument ignores the fact that the time-limitation clause *itself* includes an exception for "corporate *income* taxes" (*ibid.*) (emphasis added) for corporations such as UDC. If the time-limitation clause encompasses only property taxes, there obviously would have been no need for Congress to provide a special corporate *income* tax exemption from the scope of that clause.

Even if one made the unsupported assumption that the phrase "all property distributed" in the time-limitation clause of 25 U.S.C. 677p should be understood to refer only to property distributed prior to August 27, 1961, as petitioners contend (Pet. 15), the UDC distributions in 1984 would still be taxable. When UDC was formed, its stock was distributed tax-free to each member of the mixed-blood group. The distributions made by the corporation in 1984 represent "income derived" from the ownership of *that* property and it is the recipient's status as a stockholder that entitles him to the income. If this were not the case, petitioner Chris Denver, and other UDC shareholders who are not Indians, would not be

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nation statutes enacted in 1954. Four of those Acts (25 U.S.C. 564j, 699, 749, and 898 (repealed 1973)) state that certain property and income therefrom shall be subject to "the same taxes, State and Federal, as in the case of non-Indians." *Ibid.* In each instance, it is readily apparent that the taxes to which the property and income are subject include income taxes. There is no valid reason to assume that when Congress in 25 U.S.C. 677p used the phrase "the same taxes, State and Federal, as in the case of non-Indians", it intended for it to have a different meaning. The *in pari materia* principle of construction thus undermines, and does not support, petitioners' contention that the time-limitation clause in 25 U.S.C. 677p applies only to property taxes.

entitled to receive distributions from UDC. Even if the distributions at issue were thought to be outside the scope of the phrase "all property distributed," they clearly come within the subsequent statutory phrase "income derived therefrom." Thus, even under petitioners' erroneous reading of the statute, the distributions made by UDC in 1984 do not qualify for the limited tax exemption contained in 25 U.S.C. 677p.

The court of appeals was therefore correct in holding that, "[a]ccording to the plain language of section 677p, UDC shareholders must pay federal income tax on all distributions received after August 27, 1961" (Pet. App. A8-A9).

2. Officials of the Department of the Interior who had "oversight responsibility for the Ute Indian Tribe and UDC" (Pet. App. 19a n.8) had originally expressed the view that distributions made by UDC were tax-exempt (*id.* at 19a). Petitioners err in contending that the decision in this case—which is based on the plain language of the statute—conflicts with the "principle that an agency's interpretation of an ambiguous statute it administers is entitled to deference" (Pet. 16).

As this Court has frequently observed, when "the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.' " *United States* v. *Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989) (quoting *Caminetti* v. *United States*, 242 U.S. 470, 485 (1917)). See also *West Virginia University Hospitals, Inc.* v. *Casey*, 111 S. Ct. 1138, 1147 (1991). That rule applies even when an administrative interpretation is at odds with the plain language of the statute. *Demarest* v. *Manspeaker*, 111 S. Ct. 599, 603 (1991); *K Mart Corp.* v. *Cartier, Inc.*, 486 U.S. 281, 291 (1988); *Board of Governors*

of the Federal Reserve System v. *Dimension Financial Corp.*, 474 U.S. 361, 368 (1986); *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-844 (1984).

For the same reason, petitioners are also wrong in contending that the court of appeals failed to apply the canon of construction that "ambiguous provisions in statutes are to be construed liberally in favor of Indians" (Pet. 17). As this Court has stated on numerous occasions, "[t]he canon of construction regarding the resolution of ambiguities in favor of Indians * * * does not permit reliance on ambiguities that do not exist; nor does it permit disregard of the clearly expressed intent of Congress." *South Carolina* v. *Catawba Indian Tribe, Inc.*, 476 U.S. 498, 506 (1986). Accord, *Amoco Production Co.* v. *Village of Gambell*, 480 U.S. 531, 555 (1987); *Oregon Fish & Wildlife Dept.* v. *Klamath Indian Tribe*, 473 U.S. 753, 744 (1985); *Rice* v. *Rehner*, 463 U.S. 713, 732-733 (1983); *Andrus* v. *Glover Construction Co.*, 446 U.S. 608, 619 (1980). None of the cases cited by petitioners concerning the resolution of statutory ambiguities in favor of Indians (Pet. 16-19) holds that this canon may be used as a license to disregard the intent that Congress has clearly expressed in the plain language of the statute. This Court has expressly rejected that extreme proposition. *Andrus* v. *Glover Construction Co.*, 446 U.S. at 619 (quoting *Decoteau* v. *District County Court*, 420 U.S. 425, 427 (1975)).[8]

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[8] There is a "settled principle that exemptions from taxation are not to be implied; they must be unambiguously proved." *United States* v. *Wells Fargo Bank*, 485 U.S. 351, 355 (1988). See also *Bingler* v. *Johnson*, 394 U.S. 741, 751-752 (1969). This Court "has applied that rule to taxing acts affecting Indians as to all others." *Oklahoma Tax Comm'n* v. *United*

3. Petitioners also contend (Pet. 19-25) that the decision below merits review because it conflicts with various policies and considerations pertinent to Indians. Neither the policy behind the Ute Participation Act nor any other considerations that are relevant to that Act support petitioners' claim.

The policy behind the Ute Participation Act was that of making Indians "as rapidly as possible * * * subject to the same laws and entitled to the same privileges and responsibilities" as non-Indian citizens. H.R. Con. Res. 108, 83d Cong., 1st Sess. (1953); 67 Stat. B132. It is inconsistent with that policy to award Indian *and* non-Indian stockholders of UDC a tax exemption in perpetuity for income distributed by that corporation.

Furthermore, contrary to petitioners' claim (Pet. 20-21, 22-23), there is nothing inconsistent about taxing the *income* distributions received by shareholders of UDC and the fact that the federal trust status over the indivisible assets has not been terminated. The property that gives rise to the entitlement to UDC distributions is the UDC stock. Unlike the indivisible assets that are held by the United States in trust, the UDC stock may be freely sold by a terminated Ute to non-Indians. As this Court stated in *Affiliated Ute Citizens* v. *United States*, 406 U.S. 128 (1972), "although the undivided interests * * *

States, 319 U.S. 598, 606 (1943). See also *Choteau* v. *Burnet*, 283 U.S. 691, 696-697 (1931). While it may be true that the principle that disfavors tax exemptions must be balanced against the principle that doubtful expressions are to be construed in favor of Indians, the convergence of the two principles does not eliminate the requirement of "express exemptive language." *United States* v. *Anderson*, 625 F.2d 910, 913 (9th Cir. 1980), cert. denied, 450 U.S. 920 (1981).

held by UDC and shared with the full-bloods remained subject to restrictions * * * [t]he UDC stock, itself, * * * was free of restriction; as to it, federal termination was complete." *Id.* at 150.

Petitioners also err when they contend that the decision below results "in disparate tax treatment of terminated Utes vis-a-vis all other Indians terminated by the Eighty-third Congress" (Pet. 22). The other termination Acts contemplated that the tribal property would be distributed promptly to the terminated Indians and that the income from that property would be taxable within a relatively short period of time. As the court of appeals correctly recognized, the Ute Partition Act "involved the unique problem of distributing indivisible assets" (Pet. App. A11). If the nondivisible assets had been susceptible of equitable and practical distribution, they would have been transferred to the mixed-blood members prior to August 27, 1961, and the income thereafter realized would have been fully taxable to the recipients. Instead of receiving the indivisible assets themselves, however, the terminated Utes received (tax-free) shares of stock, which entitle them to proportionate distributions of the income received by UDC as long as they retain ownership of their stock. The terminated Utes may sell their stock at any time to non-Indians, as well as Indians. There is thus no inconsistency between the tax treatment of the terminated Utes and the treatment of other terminated Indians under similar termination Acts.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

UTE DISTRIBUTION CORPORATION, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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REPLY BRIEF OF PETITIONERS

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REPLY BRIEF OF PETITIONERS

The United States raises three basic arguments in its opposition. First, the United States baldly asserts that the distribution of assets from petitioner Ute Distribution Corporation ("UDC") to the individual petitioners constitutes "property distributed" within the meaning of Section 17 of the Ute Partition Act, 25 U.S.C. § 677p, and is therefore subject to tax. Second, although the United States concedes that the Department of Interior, the agency responsible for administering the Act, has always viewed UDC distributions as exempt from income tax, it argues that Interior is wrong. The United States asserts that, notwithstanding Interior's interpretation of Section 17, the statutory language is "plain" and therefore that Interior's interpretation is entitled to *no* deference. Br. in Opp. 13. Third, even though the distributions of tribal trust assets through UDC are the

only distributions of tribal assets subject to tax pursuant to any of the termination acts enacted in the 1950s, the United States maintains that UDC distributions are not treated differently from distributions of assets to terminated members of other tribes.

None of the arguments raised in the United States' opposition withstands scrutiny. Indeed, the positions adopted by the United States demonstrate that the decision below cannot be reconciled with important principles of statutory construction and Indian law recognized by this Court. This case therefore merits review by this Court.

1. As the petition makes clear (Pet. 14-16), Section 17 includes a blanket exemption from taxes for "distribution of the assets" under the Act, provides that "property distributed" is exempt from property tax until August 27, 1961, and provides that "property distributed" and income derived therefrom is subject to taxes after August 27, 1961. By asserting that Section 17 subjects UDC distributions to income tax after August 27, 1961 (Br. in Opp. 10), the opposition of the United States ignores the fundamental issue before this Court—whether a distribution from UDC constitutes a "distribution of . . . assets" within the meaning of Section 17 and is therefore exempt from income tax.[1] The United States makes *no* attempt to reconcile the competing phrases in that provision. Congress used two different phrases in Section 17—"distribution of . . . assets" and "property distributed"—but the United States' interpretation requires these phrases to mean the same thing. This Court's decisions do not per-

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[1] Petitioners do not dispute the general statements of the United States regarding income taxes (Br. in Opp. 9) and the principle that Indians are subject to income taxes in the absence of a specific statute relating to their taxation (*id.* at 9-10). But the incantation of these general principles certainly does not advance the argument that the court of appeals properly interpreted Section 17. *Cf. Squire* v. *Capoeman*, 351 U.S. 1, 6-8 (1956).

mit such a result. See, *e.g.*, *Russello* v. *United States*, 464 U.S. 16, 23 (1983).

Further, the United States ignores the fact that UDC distributions are distributions of indivisible tribal assets in the form of oil, gas and mineral rights held in trust for the mixed-blood and full-blood members of the Tribe. The government asserts that "cash distributions received by the petitioners in 1984 from UDC consist of amounts that UDC earned on the nondivisible assets it held." Br. in Opp. 10. But these indivisible assets are not held by UDC and were *never* distributed to UDC. Rather, those assets remain in trust, held for the current and terminated members of the Ute Tribe. See *Affiliated Ute Citizens* v. *United States*, 406 U.S. 128, 139 (1972); Pet. App. 4a. UDC merely acts as a conduit for distributions of the indivisible assets to the mixed-blood members of the Tribe. A distribution of tribal assets occurs when UDC makes payments to its stockholders.

The United States fundamentally misconstrues and distorts the argument of petitioners regarding the August 27, 1961 time limitation set forth in 25 U.S.C. § 677p. Far from being a "tortured and illogical construction" of Section 17 (Br. in Opp. 11), petitioners' interpretation of that provision is the only interpretation that comports with its plain language. Contrary to the United States' position (*id.* at 11-12), petitioners did not assert that the time limitation applies only to property taxes. Rather, Section 17 provides that (1) at the time of distribution, tribal assets are not subject to taxation; (2) until 1961, tribal assets, after being distributed, are exempt from property taxes; and (3) after August 27, 1961, after tribal property is distributed, that property and the income from such property is subject to federal and state taxes.[2]

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[2] Although the United States attempts to make much of the fact that Section 17 contains an exception for corporate income taxes (Br. in Opp. 11-12), that provision was specifically added "to

Indeed, the United States acknowledges that this is a permissible interpretation of Section 17. Both petitioners and the United States recognize that the Ute Partition Act should be interpreted *in pari materia* with other termination statutes adopted by the Eighty-third Congress. Pet. 21-22; Br. in Opp. 11 n.7. In its opposition, the United States recognizes:

> The tax provisions in the termination Acts other than the Ute Partition Act generally stated that distributed tribal property would not be subject to tax at the time of distribution, but following distribution the property and income therefrom would be subject to tax.

Id. at 5. This is the only interpretation of Section 17 that comports with the language of the Act and with this Court's principles of statutory construction. Certain Ute tribal assets, such as cash, were distributed to the mixed-blood members of the tribe prior to 1961, and those assets were not subject to tax at the time of their distribution. After August 27, 1961, interest on any such cash assets deposited in a bank, for example, was subject to tax as income derived from distributed property. In contrast, however, the oil, gas and mineral rights of the Ute Indian Tribe were not susceptible to immediate distribution and Congress recognized that those assets would be distributed over time. See Pet. 5-6. Thus, under the United States' description of the taxation of distribution of tribal assets and, more importantly, under the *plain language* of Section 17, the distribution of the indivisible assets by UDC is not subject to tax at the time of distribu-

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preserve the tax-exempt status of the distributions from the trust funds held by the United States Government on the principle that the corporation would merely act as a conduit for the transmission of funds received from the Government to the members of the mixed-blood group." H.R. Rep. No. 2744, 84th Cong., 2d Sess. 2 (1956) (emphasis added); S. Rep. No. 2432, 84th Cong., 2d Sess. 2 (1956).

tion. It is irrelevant under the language of the Act whether that distribution occurs in 1956 or in 1984.[3]

Finally, the United States asserts that the court below properly determined that UDC distributions are taxable because "its stock was distributed tax-free to each member of the mixed-blood group" and distributions from UDC represent " 'income derived' from that property." Br. in Opp. 12. But this argument reflects a fundamental misunderstanding of the operation of 25 U.S.C. § 677p and completely ignores the fact that Congress specifically referred to UDC's role in "the distribution of" indivisible tribal assets. 25 U.S.C. §§ 677i, 677p; see Pet. 15-16. The Act in general and Section 17 in particular govern the distribution of tribal assets. The stock of UDC is not and never was a tribal asset. Therefore, the distribution of UDC stock is not subject to the provisions of Section 17; it is the underlying tribal assets held in trust that are at issue here and that are subject to Section 17.[4]

2. Since the Department of Interior's first comments on the Ute Termination Act as part of the Act's consideration by Congress in 1954, Interior has consistently recognized that distributions of indivisible tribal assets are exempt from income tax. See Pet. 7-8, 15-16; Pet. App. 31a-66a.[5]

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[3] The situation here parallels that of *Squire* v. *Capoeman*, 351 U.S. 1 (1956), a case wrongly cited by the government for the proposition that UDC distributions to petitioners should be subject to income tax. Br. in Opp. 5, 9-10. There, this Court held that "it is necessary to preserve the trust and income derived directly therefrom, but it is not necessary to exempt reinvestment income from tax burdens." *Squire*, 351 U.S. at 9.

[4] Although the United States highlights the fact that petitioner Chris Denver is a non-Indian stockholder (*see* Br. in Opp. 7 n.5, 12-13), it is far more significant that several full-blood Ute Indians, such as petitioner Henry Wopsock, agreed to be terminated from the Tribe in exchange for the benefits set forth in the Act.

[5] Although the United States asserts that Interior "originally" expressed the view that UDC distributions were exempt from taxa-

Significantly, the United States does not dispute that the Department of Interior is responsible for administering the Act and concedes that Interior's interpretation of Section 17 should be analyzed under the two-step deference test set forth in *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). But the United States insists that Interior's contemporaneous, consistent and long-standing interpretation of Section 17 is "at odds with the plain language of the statute" under the first step of the *Chevron* test. Br. in Opp. 13-14. But the *Chevron* line of cases on which the government relies makes clear that the intent of Congress must be "unambiguously expressed" before an agency's interpretation is entitled to *no* deference. See *Board of Governors* v. *Dimension Fin. Corp.*, 474 U.S. 361, 368 (1986); *Chevron*, 467 U.S. at 842-43. As the first argument set forth above starkly reveals, at a minimum, Section 17 is ambiguous and Interior's long-held and consistent administrative interpretation should have been followed.

The petition also made clear that the decision below conflicts with a long line of decisions of this Court holding that ambiguous statutory provisions should be interpreted liberally in favor of Indians. Pet. 17-19. Although the United States asserts that this principle does not apply when a statute is unambiguous (Br. in Opp. 14), it has not attempted to explain how Section 17 is unambiguously clear in light of this Court's decision in *County of Yakima* v. *Confederated Tribes & Bands of the Yakima Indian Nation*, 112 S. Ct. 683 (1992). As petitioners demonstrated, that case makes plain that Section 17 is, at a minimum, ambiguous and should be interpreted liberally in favor of the mixed-blood members of the Tribe. Pet. 18-19. The government has failed to show that the decision below is consistent with decisions of this Court

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tion (Br. in Opp. 13), Interior officials expressed that view as recently as 1987 and specifically rejected the Internal Revenue Service's interpretation of Section 17 that lead to this litigation. Pet. App. 31a.

recognizing this fundamental tenet of Indian law, and review by this Court is therefore warranted.

3. Petitioners demonstrated that the decision below conflicts with important and well recognized principles reflected in the now abandoned termination policy and in the trust relationship through which the indivisible tribal assets are held. See Pet. 22-23. The United States attempts to minimize the importance of the question presented in this case by asserting that there are two reasons why review by this Court is not warranted.

First, the United States argues that the taxation of the distribution of the trust assets is not inconsistent with that trust relationship. Again, however, the United States incorrectly asserts that "[t]he property that gives rise to the entitlement to UDC distributions is the UDC stock." Br. in Opp. 15. But it is clear that the property that gives rise to the distributions consists of the tribal assets held in trust that were not susceptible to equitable and practical distribution. These assets are to this day held by the United States in trust for the terminated members of the Ute Tribe, and Indian policy reflects that the distribution of tribal trust assets to individual Indians is not subject to income tax. See Pet. 22-23.

Second, the opposition contends that there is no disparate tax treatment of terminated Utes vis-a-vis other Indians terminated during the 1950s, because the other termination acts contemplated that assets would be distributed "promptly." Br. in Opp. 16. The government asserts:

> If the nondivisible assets had been susceptible of equitable and practical distribution, they would have been transferred to the mixed-blood members prior to August 27, 1961, and the income thereafter realized would have been fully taxable to the recipients.

Id. Petitioners do not dispute this statement. But the government's hypothetical does not change the fact that

the tribal trust assets were not susceptible to division and distribution. Indeed, those assets have never been distributed. There is no question that under the other termination statutes, assets were not taxed at the time of their distribution. Further, it is clear based on the language of Section 17 that Ute tribal assets should not be taxed at distribution. Because of the decision below, only the terminated mixed-blood Utes, among all of the members of the various Indian tribes terminated during the 1950s, are subject to income tax on the distribution of their tribal assets. Fundamental fairness dictates that this Court review the claims of the singularly disadvantaged group and correct this injustice.

CONCLUSION

For the foregoing reasons and for the reasons set forth in the petition, the petition for a writ of certiorari should be granted.

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